Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

IN RE POTASH ANTITRUST LITIGATION

Hahnaman Albrecht, Inc., et al.,

Petitioners,

v.

Potash Corporation of Saskatchewan, Inc., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Eighth Circuit's restrictive summary judgment standard, which directly conflicts with the standard in other circuits, improperly require that to defeat summary judgment in a price-fixing case, plaintiff must do more than show that the evidence can reasonably be viewed to demonstrate collusion?

2. Has the Eighth Circuit improperly excluded probative evidence of a price-fixing conspiracy under the "tends to exclude" standard of Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) because such evidence does not directly establish the offer and acceptance of a price-fixing agreement?

PARTIES TO THE PROCEEDINGS

The following individuals and companies were plaintiffs/appellants in the court of appeals and are Petitioners in this Court:

John Peterson, d/b/a Almelund Feed & Grain
Hahnaman Albrecht, Inc.
James River Farm Service, Inc.
AG Network, Inc.
Laing-Gro, Inc.

No petitioner has a parent or subsidiary company.

The following companies were defendants/appellees and are Respondents in this Court:

Potash Corporation of Saskatchewan, Inc.
Potash Corporation of Saskatchewan Sales, Ltd.
Cominco, Ltd.
Cominco American, Inc.
IMC Global, Inc.
Kalium Chemicals, Ltd.
Kalium Canada, Ltd.
Potash Corporation of America

The following companies were defendants/appellees and are not Respondents in this Court:

PPG Industries, Inc.
PPG Canada, Ltd.
Noranda Mineral, Inc.
Noranda Sales Corporation Ltd.
Central Canada Potash Co.
New Mexico Potash Corporation
Eddy Potash, Inc.

The above Respondents have filed Certificates of Interested Parties in the Eighth Circuit.

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OPINIONS BELOW

The 6 to 5 en banc opinion of the Court of Appeals, as entered on February 17, 2000, is reported at 203 F.3d 1028 (8th Cir. 2000). The panel opinion of the Eighth Circuit reversing the grant of summary judgment for defendants was originally reported at 176 F.3d 1055 (8th Cir. 1999). The District Court opinion, affirming the judgment of the Magistrate Judge, granting summary judgment for defendants, is reported at 954 F. Supp. 1334 (D. Minn. 1997).

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was entered on February 17, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns Section 1 of the Sherman Act. 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

and Rule 56 of the Federal Rules of Civil Procedure:

> (a) **For Claimant**. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (b) **For Defending Party**. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> (c) **Motion and Proceedings Thereon**. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
>
> (d) **Case Not Fully Adjudicated on Motion**. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall

if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set fort specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify

the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith**. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

By a bare 6-5 majority, the Eighth Circuit en banc has, by its own admission, issued a determination that conflicts with the rulings of other circuits as to the meaning of this Court's most important precedents on summary judgment in antitrust cases. The Eighth Circuit's acknowledgment of that split confirms the disarray in the courts on this much litigated question: what standard should a federal district court apply to determine whether a plaintiff's evidence in a price-fixing case is sufficient to survive defendant's summary judgment motion and go to trial.

The en banc majority of the Eighth Circuit – and in its view, the "majority" of other circuit courts – adopted a standard which "broadly" applies this Court's decisions in Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984), and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). (A-7.) As applied by the Eighth Circuit, this standard means that, on motion for summary judgment, the inferences from disputed evidence will no longer be viewed in favor of the non-moving party. Thus, in its view, the court, acting as a finder of fact, will weigh circumstantial evidence as it sees fit to decide whether it supports a reasonable inference of both price fixing and lawful oligopolistic action, and then decide on its own initiative which explanation to accept. No longer is it enough for a plaintiff in a price-fixing case to show that the evidence could reasonably be viewed to demonstrate that the defendants conspired to fix prices, that is, evidence that "tends to exclude the possibility of independent action." Monsanto, 475 U.S. at 588 (emphasis added).

This case demonstrates the effects of adopting the restrictive standard articulated by the en banc majority. The record here provided substantial evidence of a conspiracy to fix prices in the market for potash, a commodity which is an essential ingredient in fertilizer. For instance, there is

substantial evidence of frequent reciprocal price exchanges regarding discounts on pricing. These exchanges were between "high-level executives who were responsible for pricing decisions." (A-34, Gibson, J. dissenting.) The Eighth Circuit majority regarded all this evidence as completely nonprobative of a price-fixing conspiracy, stating:

> The problem with this theory, as indicated, is that the price verification communications only concerned charges on particular completed sales, not future market prices. There is no evidence to support the inference that the verifications had an impact on price increases. The only evidence is that prices were possibly cut as a result. . . . There is no evidence here that price increases resulted from any price verification or any specific communication of any kind. Subsequent price verification evidence on particular sales cannot support a conspiracy for the setting of a broad market price on September 4, 1987.

(A-10.)

This restricted approach is inconsistent with the teachings of this Court that secret price communications may be a tool to prop up cartel behavior, as these price verification calls do. See, United States v. U.S. Gypsum Co., 438 U.S. 422, 456 (1978). In an oligopolistic market such as the one for potash, where the product is a commodity, no defendant would find it in its own economic self-interest to reveal below-list prices if that firm were operating independently. Each firm knows that its secret list price discount is the only real means of competition at its disposal. Once that price concession becomes known throughout the industry, it can be matched. The would-be price-cutter would be "shooting himself in the foot" by revealing this information that could only destroy his pricing advantage. (A-36, Gibson, J. dissenting). However,

the majority concluded that because this evidence did not constitute the offer and acceptance of a particular price-fixing transaction, it was not probative. This despite the fact that the price exchanges were strong circumstantial evidence of conspiracy. For example, members of a cartel engage in these "policing" communications to prevent cheating on the agreed price. As the dissent notes, "The Court today rejects circumstantial evidence of conspiracy and requires direct evidence to withstand summary judgment in an antitrust case." (A-20.)

Other circuit courts take a very different view of the proper summary judgment standard. As Chief Judge Posner of the Seventh Circuit has explained, the correct standard recognizes that it does not matter whether evidence of suspicious inter-firm contacts is "susceptible to an innocent interpretation": "[T]he issue . . . is not whether the wholesalers were in fact participants in a price-fixing conspiracy; it is whether there is sufficient evidence of this to create a jury issue. . . . The defendants' interpretations may be correct; they are not inevitable." In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 614 (7th Cir. 1997) ("Brands I"). The decisions of other circuits discussed further below, are to the same effect. See, e.g., Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1230 (3d Cir. 1993)(plaintiff need not "match, item for item, each piece of evidence proffered by the movant, but simply must exceed the mere scintilla standard") (internal quotation omitted); and City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 571 n.35 (11th Cir. 1998)(plaintiff not required to "exclude the possibility of independent action" at summary judgment, but rather must "show that an inference of conspiracy is reasonable") (internal quotation omitted).

There can be little doubt that the case would have reached the jury if brought in the Third, Seventh or Eleventh Circuits. This case thus presents a direct conflict between the

circuits on an issue that goes to the heart of private antitrust enforcement. The restrictive standard "will substantially eliminate antitrust conspiracy as a ground for recovery in [that] circuit". (A-20, Gibson, J., dissenting). The Court should grant certiorari to provide clarity and guidance on the critical and recurring question of what standards govern the award of summary judgment in price-fixing cases.

A. STATEMENT OF FACTS

Before the spring of 1987, competition was intense in the potash industry. During the previous few years, the major producers[1] had expanded their capacity in anticipation of increased sales. As demand for this commodity product decreased, however, price wars ensued and 1986 prices reached all-time lows of $46 per ton.

The attempts of individual firms to increase prices unilaterally during 1986 failed, and individual producers were forced to rescind increases when competitors undercut them. Faced with an industry crisis, defendants concluded that joint action was needed to end the price wars. PCS, which was owned by the Saskatchewan government, was the largest producer. It acknowledged: "Cannot wait for supply/demand

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[1] The defendants below were Potash Corporation of Saskatchewan, Inc. and Potash Corporation of Saskatchewan Sales, Ltd. (collectively "PCS"); Cominco, Ltd. and Cominco American, Inc. (collectively "Cominco"); IMC Global, Inc.; Kalium Chemicals, Ltd., Kalium Canada, Ltd. and its former owner and operator, PPG Industries, Inc. and PPG Canada, Ltd. (collectively "Kalium"); Noranda Mineral, Inc., Noranda Sales Corporation Ltd. and Central Canada Potash Co. (collectively "Noranda"); Potash Corporation of America, Inc. ("PCA") and New Mexico Potash Corporation (NMPC) and its affiliate, Eddy Potash Inc. ("New Mexico/Eddy"). Defendants PPG, Noranda and New Mexico/Eddy were each granted summary judgment on independent grounds and those judgments were separately affirmed. Petitioners do not include those judgments or those defendants in their Petition for Certiorari.

to pull us up. Cannot do it alone. Industry must cooperate. Key is discipline." (A-137.) The then-president of PCS Sales, Rolf Holzkaemper, flatly stated:

> It is not possible for a single producer to affect [sic] a turn-around; however, joint action by a group of producers or governments could achieve this.

(A-21, A-31.)

Efforts to end the vigorous price competition began in the spring of 1987 when Charles Childers and William Doyle left IMC (PCS' largest competitor) to run PCS and prepare it for privatization. By June of 1987, price cutting ceased and all producers raised prices by $5.00 per ton. Moreover, parallel to efforts to raise and stabilize prices, defendants took steps, according to defendant Kalium, "to bring inventory into balance and appeared prepared to take further [production] cuts to stabilize prices."

In August 1987, after a lengthy investigation, the United States Department of Commerce (DOC) preliminarily determined that the Saskatchewan potash producers had been dumping potash in the United States. In response, the DOC set "preliminary dumping margins," which were different for each producer. This interim sanction required each producer to post a bond equivalent to its individual dumping margin (i.e. "duties") on each sale of potash. Two weeks after the announcement of the preliminary margins, in lieu of its DOC bond requirements, Childers had PCS levy a $35 per ton "surcharge" on all potash sold in the United States, an amount that was significantly lower than PCS' margin and its requisite bond. (A-23.) Despite substantial variations in their margins, all Saskatchewan producers promptly added a $35 surcharge, rather than the varying amounts necessary to cover the bond requirements for each defendant's individual dumping margin. In particular, IMC and Kalium, (the second and third largest producers, after PCS), were faced with lower

duties, and thus had the opportunity to gain market share by adding a lower surcharge, thereby keeping their prices below PCS. Just four months earlier, in May of 1987, Childers had expressed his worries about the potential for such a dumping margin variation: "Some of our Saskatchewan co-producers wouldn't mind a duty as long as PCS is hit harder than they are, due to the obvious market implications." (A-144.) Nonetheless, in August, 1987 Childers and PCS were confident that no defendant would use the margin variations to gain market share. None did.

On January 8, 1988, the anti-dumping proceedings were terminated by a "Suspension Agreement" which, Defendants contend, mandated different floor prices for each producer. Nonetheless, at the time of the signing of the Suspension Agreement, all defendants had agreed to increase prices by an identical $18 per ton. This future pricing was disclosed by a January 8, 1988 memorandum from Canpotex:[2]

> FYI Canadian potash producers have reached agreement with the United States Department of Commerce and all dumping action has been suspended for a minimum of 5 years. It is rumored that the USD per metric ton increase posted by Canadian producers in 1987 to cover possible tariff payments to the U.S. Govt will be refunded in full or part. In the meantime new price lists are being issued on Monday Jan. 11 at: Standard Grade USD 80.00; Coarse Grade USD 84.00; Granular Grade USD 86.00. (Emphasis added.)

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[2] Canpotex is a cartel organized to sell Canadian potash for export on a joint basis. Its directors are senior executives of the Canadian potash producers. It is precluded by law from involvement in the sale of potash to the United States and there is no valid reason for future American price increases to be the subject of discussion. (A-135, n. 19.)

(A-13.)

Each of the Canadian producers did raise their price by $18, which was the amount revealed in the memorandum. This meant that, in less than a year of the Childers'/Doyle reign at PCS, Canadian potash prices had increased to $86 per ton, nearly double the price which prevailed when PCS acknowledged the need for industry cooperation.[3]

The record below contained an enormous amount of evidence of coordinated marketing, pricing and production policies between the Defendants throughout the entire conspiracy period. This included the following:

- Repeated efforts by high ranking executives of competing firms to obtain industry consensus on pricing, production and marketing policies (see, e.g., A-136-141);

- Inter-firm communications between high ranking executives regarding prices to specific customers and geographic areas (see, e.g., A-186);

- Inter-firm communications between high ranking executives coordinating the timing and effect of price increases(see, e.g., A-181-187);

- Direct communications between high ranking executives of competing firms regarding "cheating" on prices (see, e.g., A-200-209);

[3] Kalium's $18 price increase resulted in prices which were $1 higher. This reflected the traditional price difference as a result of Kalium's product having a slightly higher potassium content. (A-117; A-162.)

- Policing pricing and retaliation against price cheaters including a "Market Correction Program" by PCS (see, e.g., A-167-173);

- Apologies by high ranking executives of offending firms for accidental episodes of price competition (see, e.g., A-198-200); and

- The inexplicable failure, against their own economic self-interests, of certain Defendants to exploit competitive opportunities (see, e.g., A-141-159).

Plaintiffs' economic expert, Dr. Gordon R. Rausser,[4] reviewed the record and concluded that Defendants' behavior was fully consistent with a horizontal price-fixing conspiracy. Professor Rausser further concluded that as a result of the conspiracy, prices were increased and stabilized above the levels which would have been expected in an oligopolistic industry absent collusion as well as above the prices mandated by the Suspension Agreement.

B. THE DECISIONS BELOW

These consolidated civil antitrust class actions were brought in 1993, alleging a conspiracy to raise and stabilize prices of potash in violation of the Sherman Act, 15 U.S.C. § 1. The District Court certified a class of all persons who directly purchased potash from the defendant producers between April 1987 and July 1994.

The defendants moved for summary judgment arguing that plaintiffs failed to produce any evidence that the defendants colluded, and that the price increases, while conceded to be virtually identical, were the product of

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[4] Dean of the College of Natural Resources and the Robert Gordon Sproul Distinguished Professor at the University of California at Berkeley.

independent conduct. The motion was referred to a Magistrate Judge.

In an opinion covering 146 pages, the Magistrate Judge fragmented the record, separately examined each piece of evidence and determined that none, by itself, convinced him that a price-fixing conspiracy among defendants was more likely than lawful oligopolistic pricing. (See e.g., A-104.) His conclusion rested on a misinterpretation of Matsushita and Monsanto which led him to believe that, in a case involving circumstantial, rather than direct, evidence, each piece of evidence had to exclude (rather than tend to exclude) the possibility of independent action. Time after time, the Magistrate Judge rejected evidence from which collusion could reasonably be inferred because he found some alternative explanation inferring independent action. (A-122, 126.) His evaluation of the evidence effectively negated the well established principle that all reasonable inferences are to be read in the light most favorable to the non-movant. He transformed the trial court into a super-juror or gatekeeper, (A-131), and usurped the traditional jury role of finding facts from competing inferences. The Magistrate Judge's Report and Recommendation was adopted by a two page order of the District Court. (A-101.)

On appeal, the three-judge panel of the Eighth Circuit recognized that the Magistrate Judge had applied the wrong standard and, in a 2-1 decision, it reversed the grant of summary judgment and remanded the case for trial. That order was vacated and rehearing en banc was granted. (A-49; A-52.)

In a 6 to 5 decision, the majority of the Eighth Circuit en banc reinstated summary judgment for the defendants in an opinion acknowledged to be at odds with the holdings of

other Courts of Appeals.[5] (A-7.) In its opinion, the majority specifically discussed only two pieces of evidence from the voluminous record. Based on its reading of Monsanto and Matsushita, and its understanding of the relevance of interfirm communications, the Eighth Circuit did not review the evidence in the light most favorable to the non-moving party. Instead, it gave dispositive weight to defendants' explanations even though plaintiffs contested them at every point. For example, the defendants claimed that all price movement was explained by the 1987 dumping proceedings, the 1989 privatization of PCS and the Saskatchewan pro-rationing legislation which, however, was never put into effect. These explanations were accepted as correct even though the record contained ample factual and economic evidence which, when read favorably to plaintiffs, reasonably led to the opposite conclusion. By choosing sides on all disputed issues, the majority found that the evidence did not "exclude the possibility of independent action" and that summary judgment was appropriate. In short, the Eight Circuit majority read Monsanto's requirement that evidence "tend to exclude the possibility of independent action" to mean that plaintiffs are required to exclude all possibility of independent action in order to survive defendant's motion for summary judgment.

The five members of the en banc dissent followed the correct standard espoused by other Courts of Appeals — that all reasonable inferences should be read in favor of non-movants such that, if a rational jury could find in favor of plaintiffs, a motion for summary judgment should be denied. Using this standard, the en banc dissent explained that the circumstantial evidence proffered by plaintiffs did tend to exclude the possibility of independent action. In its view

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[5] This split was first set forth in Corner Pocket of Sioux Falls, Inc. v. Video Lottery Tech., Inc., 123 F.3d 1107, 1109 (8th Cir. 1997) cert denied 118 S.Ct. 1054 (1998).

summary judgment was inappropriate because plaintiffs were not required conclusively to exclude any possibility of independent action.

REASONS FOR GRANTING THE PETITION

I. THE CORRECT SUMMARY JUDGMENT STANDARD

The basic question in any motion for summary judgment is whether the plaintiff has presented evidence sufficient to raise a genuine dispute over matters of fact. Under this standard it is clear that the plaintiff cannot prevail simply on the bare allegations contained in the complaint, especially when the defendant offers competent evidence to support its own view of the facts in the case. But once the plaintiff has presented competent evidence that supports its position, only the jury can decide whether to accept or reject that evidence. The evidence demanded of the plaintiff, moreover, need not be conclusive—otherwise the standard of proof would be surreptitiously raised from a preponderance of the evidence to proof beyond a reasonable doubt. Rather, that evidence must simply support a reasonable inference that the plaintiff's version of the facts is true, even if defendants contend that contrary inferences could be drawn from the same evidence. As so conceived, the rules of summary judgment are respectful of the right of the jury to decide any ultimate issues of fact on the strength of conflicting evidence. As this Court observed in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 (1962), "The Court of Appeals was, of course, bound to view the evidence in the light most favorable to Continental [the nonmoving party] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might be reasonably drawn." So long as the proof offered by the plaintiff advances its case on some nonfanciful interpretation

of the facts, it is for the jury – not the court – to decide whether to accept that interpretation. The quantum of evidence offered in support of the plaintiff's view is in general irrelevant so long as the basic threshold on evidence has been crossed.

A. UNITED STATES SUPREME COURT RULINGS

In Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) this Court held that:

> antitrust law limits the range of permissive inferences from ambiguous evidence in a § 1 case. Thus, in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. (Citations omitted). To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S. at 764.

In the context of this Court's decision in Matsushita, this standard makes perfectly good sense. The "ambiguous evidence" to which the decision refers is the identical low prices that all the firms charged. But that conduct remained ambiguous because the defendants "had no motive to engage in the alleged predatory pricing conspiracy; indeed they had a strong motive not to conspire in the manner respondents allege." Id. In light of the economics of predation, it is dangerous to infer a conspiracy solely from identical prices. Hence summary judgment was granted when the plaintiff

could not produce any additional evidence --- dubbed the so-called "plus factors" --- needed to make out a case sufficient to reach the jury. Given the context, the plaintiffs in Matsushita had presented no evidence that "tends to exclude the possibility that the conspirators acted independently."

Of course, the general conceptual frame discussed in Matsushita is not limited to cases of predatory pricing. Monsanto itself involved a vertical pricing fixing case in which the question was whether the manufacturer's termination of a single distributor violated the antitrust laws, by acting in response to price-cutting complaints raised by other distributors. This Court held that evidence of termination, without more, was ambiguous because it did not tend to preclude the possibility that the manufacturer acted on its own in terminating the distributor. However, additional evidence showed that Monsanto on at least two occasions had threatened to reduce supplies to other price-cutting distributors; and in "an arguably more ambiguous example...discusse[d] Monsanto's efforts to 'get[] the market place in order.'" Monsanto, 465 U.S. at 765. Both forms of evidence were subject to strong counterattack – but only before a jury. Therefore summary judgment against plaintiffs was reversed.

B. THE EIGHTH CIRCUIT'S RESTRICTIVE SUMMARY JUDGMENT STANDARD IS IN CONFLICT WITH THE THIRD, SEVENTH AND ELEVENTH CIRCUIT RULINGS

In their interpretations of Matsushita and Monsanto, the Third, Seventh and Eleventh Circuits developed a perfectly coherent methodology for sifting out triable antitrust claims from those for which summary judgment is properly awarded. The first step is to identify whether some basic course of conduct is present that is found both in legal and illegal forms of activity. That conduct, standing alone, does not tend to

exclude the possibility of independent action and, without more, justifies a summary judgment for the defendant. In Monsanto, the basic conduct was dealer termination. In price-fixing cases, it is parallel pricing. But plaintiffs in price-fixing cases do not rest their case with proof of parallel pricing and Matsushita only requires that the plaintiff present "reasonable" evidence to break the ostensible tie between the legal and illegal characterization of defendants' conduct. Given reasonable evidence probative of conspiracy, then, the case must be left to the jury even if the court would have decided the case the other way if it had been the trier of fact.

For example, in Brands I, 123 F.3d 599, 614 the Seventh Circuit stated:

> The defendants argue that each of these "smoking guns" is susceptible of an innocent interpretation. But the issue before us is not whether the wholesalers were in fact participants in the price-fixing conspiracy; it is whether there is sufficient evidence of this to create a jury issue. In deciding this question we must construe the evidence as favorably to the plaintiffs as the record permits, not as favorably to the defendants as it permits. The defendants' interpretations may be correct; they are not inevitable.

See also JTC Petroleum Co. v. Piasa Motor Fuels, 190 F.3d 775 (7th Cir. 1999).

> The evidence is contested by the defendants, but the resolution of the contest is for trial. Id. at 1077.

In City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548 (11th Cir. 1998) the Eleventh Circuit held that, "[f]or all the inadequacies in the record," there was sufficient evidence of a

price-fixing conspiracy to reach the jury on a conspiracy to fix prices for repackaged chlorine in Alabama.

> The necessary "plus factor" is established by the high and rising incumbency rates demonstrated by McClave's [plaintiff's economic expert's] data; these rates peaked at over 90 percent during the middle of the period of the alleged conspiracy in the southern Alabama submarket, and at nearly 90 percent in the northern submarket, during a period of stable costs, high and rising prices, and high and rising profits. Oligopolists behaving in a legal, consciously parallel fashion could achieve high and rising prices, even as costs remained stable, by engaging in price leadership. . . . The odds that they could achieve a price and profit increase and maintain incredibly high incumbency rates – that is, maintain the very same distribution of municipal contracts year after year – are minuscule, however, unless the oligopolists were communicating with one another.

Id. at 572 (citations omitted).

Similarly, the Third Circuit stated in Petruzzi's:

> [A]t the summary judgment stage, a court is not to weigh the evidence or make credibility determinations. [Big Apple BMW] 974 F.2d at 1363. Instead, these tasks are left for the fact-finder. To raise a genuine issue of material fact, therefore, "the [summary judgment] opponent need not match, item for item, each piece of evidence proffered by the movant," but simply must exceed the "mere scintilla" standard. Additionally, a court should not tightly compartmentalize the evidence put forward by the nonmovant, but instead should analyze it as a

> whole to see if together it supports an inference of concerted action. Id. at 1364.
>
> As in other cases, a nonmovant plaintiff in a section 1 [antitrust] case does not have to submit direct evidence, i.e. the so-called smoking gun, but can rely solely on circumstantial evidence and the reasonable inferences drawn from such evidence . . . .

Petruzzi's, 998 F.2d at 1230 (citations omitted).

Professor Areeda has stated in explaining the summary judgment standard in antitrust cases:

> Requiring plaintiffs to exclude the possibility of defendant's innocence would increase the burden of proof beyond the usual civil standard of 'a preponderance of the evidence' to beyond a reasonable doubt' or even to 'certainty.'

II Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, ¶ 322, at 70 n.30. (Rev.ed 1995 & Supp. 1996).

> [I]n Matsushita the Court surely did not mean that the plaintiff must disprove all non-conspiratorial explanations for the defendants' conduct. Not only did it use the word "tend," but the context made it clear that the Court was simply requiring sufficient evidence to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not.

(Id. ¶ 1405 at 833 (1996 Supp.)

This Court confirmed the correctness of this reading of Matsushita in its subsequent decision in Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 468-469 (1992). The Court's requirement in Matsushita that the plaintiffs' claims make economic sense did not introduce a

special burden on plaintiffs facing summary judgment in antitrust cases:

> The Court did not hold that if the moving party enunciates any economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Eastman, 504 U.S. at 468-469 (1992).

II. THE EFFECT OF THE RESTRICTIVE SUMMARY JUDGMENT STANDARD

In vacating the three judge panel's decision, and affirming the grant of summary judgment, the en banc majority highlighted the growing split between the Courts of Appeals [with the restrictive standard being rejected by the Third[6], Seventh[7] and Eleventh Circuits[8]], on the applicable standards for a non-movant to withstand summary judgment. The restrictive standard followed by the Eighth Circuit in

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[6] Petruzzi's IGA Supermarkets Inc. v. Darling-Delaware, 998 F.2d 1224 (3d Cir. 1993); Rossi v. Standard Roofing Inc., 156 F.3d 452 (3d Cir. 1998).

[7] JTC Petroleum Co. v. Piasa Motor Fuels Inc., 190 F.3d 775 (7th Cir. 1999); In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599 (7th Cir. 1997) cert. denied 522 U.S. 1153 (1998);

[8] City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548 (11th Cir. 1998)

effect requires that, to avoid summary judgment, plaintiffs must prove their claim to the court, acting as a finder of fact. The correct standard followed by the Third, Seventh and Eleventh Circuits is that the Court's inquiry should be limited to whether there is sufficient evidence, construed as favorably to the plaintiffs as the record permits, to create a jury issue. This difference is not mere sophistry but a matter of paramount importance to the fair and uniform application of summary judgment in horizontal price-fixing cases.

Pursuant to the standards enunciated by the en banc majority, plaintiffs' evidence was first scrutinized to determine whether there was proof of an offer, and acceptance of that offer, to collude. Failing that direct/circumstantial test, the majority assures the grant of summary judgment because circumstantial evidence, by its nature, is always capable of more than one interpretation.

As set forth by the five dissenting Judges in the en banc opinion:

> The Court today rejects circumstantial evidence of conspiracy and requires direct evidence to withstand summary judgment in an antitrust case. The court's requirement of direct evidence is contrary to Monsanto v. Spray-rite Service Corp., 465 U.S. 752, 768 (1984), which only required "direct or circumstantial evidence that reasonably tends to prove. . . a conscious commitment to a common scheme designed to achieve an unlawful objective." (Emphasis added). Because conspirators cannot be relied upon either to confess or to preserve signed agreements memorializing their conspiracies, the court's requirement for direct evidence will substantially eliminate antitrust conspiracy as a ground for recovery in our circuit.

203 F.3rd at 1039.

The dissent's conclusion is confirmed by a review of the majority's treatment of the snippets of evidence, taken in isolation, it chose to discuss among the massive evidentiary record of secret pricing discussions, accusations between competitors of "cheating", apologies for mistaken price cuts and retaliation for price-cutting. For example, the en banc majority focused on the so called price verification calls, reasoning that these communications only dealt with "past" transactions and did not themselves constitute the offer and acceptance of a price fixing conspiracy. (A-9-10.)

In fact, these communications[9] enabled the calling Defendant to avoid undercutting its competitors on new sales. Every Defendant participated in these price stabilization calls. Moreover, the nearly complete absence of such calls prior to the conspiracy, the frequency of these calls during the conspiracy period, the intimate involvement of high-level executives, and the communication of internal pricing information directly to competitors would allow a jury reasonably to infer that the calls were intended to, and did, raise, stabilize and maintain prices. As plaintiffs' economic expert, Professor Rausser, explained, the price verification calls were inconsistent with the "pricing secrecy" sought by participants in oligopolistic industries because in such industries "each producer would like to secretly 'shade' price, thereby gaining sales and avoiding retaliation." (A-35; 37.) Yet despite a powerful inference of collusion, the majority reasoned that, because this circumstantial evidence did not preclude independent action with certainty, it was not sufficiently persuasive to send to a jury. In so doing, it laid down a rule in clear conflict with United States v. United

[9] These pricing communications are especially significant because only the large volume purchases made by a few regional or national customers occur at prices other than list. It is these relatively few off-list transactions that generated the extensive pricing communications between Defendants.

States Gypsum Co., 438 U.S. 422, 456 (1978), where this Court wrote:

> [p]rice concessions by oligopolists generally yield competitive advantages only if secrecy can be maintained; when the terms of the concession are made publicly known, other competitors are likely to follow and any advantage to the initiator is lost in the process. Thus, if one seller offers a price concession for the purpose of winning over one of his competitor's customers, it is unlikely that the same seller will freely inform its competitor of the details of the concession so that it can be promptly matched and diffused. (Emphasis added)(citations omitted).

The majority's flawed analytical construct also led to the Eighth Circuit's serious misinterpretation of the January 8, 1988 Canpotex memorandum (Supra, p.10). A reasonable reading of this document would permit a rational jury to find that the defendants, all members of the Board of Directors of Canpotex, had coordinated the upcoming price rise. In line with established law the dissent pointed out:

> The prophecy by Canpotex that its members would issue new "price lists" with particular prices does indeed tend to show the price increase was coordinated, because otherwise it would have been impossible to know in advance what the individual producers would do.

(A-44, Gibson, J. dissenting.)

However, by denying plaintiffs the benefits of having all reasonable inferences read in their favor, the majority acted as a trier of fact and concluded:

> We agree with the magistrate judge's finding that this document was not sufficient evidence to exclude an inference that the producers acted independently.

(A-14.)

III. EFFECT OF THE CONFLICT

By adopting this restrictive view of the evidence, the Eighth Circuit en banc majority, as noted earlier, directly conflicts with summary judgment standards espoused by other courts of appeal. In In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781(7th Cir. 1999), ("Brands II"), the Court analyzed the type of evidence that plaintiffs could use at trial to prove that defendants had engaged in price-fixing:

> There were two ways in which they might have been able to do this: by presenting direct evidence (admissions or eyewitness accounts) that the manufacturers had agreed to collude; or by presenting circumstantial evidence, economic in character, that their behavior could better be explained on the hypothesis of collusion than on the hypothesis that each was embarked on an individual rather than a concerted course of action—that each, in other words, was merely exploiting the market power it had, rather than seeking to create or amplify such power through an agreement with competitors not to compete. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984).

Brands II, 186 F.3d at 785 (additional citations omitted).

Clearly, the evidence discussed herein, as well as the plethora of additional evidence in the record, is precisely what

the Seventh Circuit as well as the Third and Eleventh Circuits had in mind as being sufficient for plaintiffs to meet their burden. Defendants' actions are not comprehensible in the context of oligopolistic pricing without collusion. However, they are perfectly consistent with price-fixing activity. This circumstantial evidence would be sufficient for plaintiffs to have defeated summary judgment under the traditional standard used in these other circuits but not under the restrictive standard followed by the Eighth Circuit.

The depth of this conflict is well illustrated by two recent decisions of the Seventh Circuit. In the first, Brands II, the Seventh Circuit[10] considered the restrictive summary judgment standard which the Eighth Circuit has now adopted. The Court held that plaintiffs

> did not, however, as the defendant manufacturers rather absurdly argue, have to exclude all possibility that the manufacturers' price discrimination was unilateral rather than collusive. That would imply that the plaintiff in an antitrust case must prove a violation of the antitrust case laws not by a preponderance of the evidence, not even by proof beyond a reasonable doubt (as indeed is required in criminal antitrust cases), but to a 100-percent certainty, since any lesser degree of certitude would leave a possibility that the defendant was innocent.

Brands II, 186 F.3d at 787.

In JTC Petroleum, 190 F.3d at 779 the Seventh Circuit said:

> There may be an innocent explanation for why producers would charge lower prices elsewhere or

[10] The Seventh Circuit cited with approval the now vacated panel decision of the Eighth Circuit in this litigation. 186 F.3d at 785.

why they refused to sell to JTC. But the only issue for us, in reviewing the grant of summary judgment for these defendants, is whether a rational jury, having before it the evidence developed to date, could conclude (construing the evidence as favorably to the plaintiff as the record permits) that the reason for the producers' refusal to deal with JTC was that they were in cahoots with the cartel to discourage competition in the applicator market.

IV. STRONG POLICY REASONS SUPPORT THE GRANTING OF CERTIORARI IN THE INSTANT CASE

The Court should grant certiorari because the decision below represents a serious threat to the uniform administration not only of the antitrust laws, but of all summary judgment practice. Because the vast majority of price-fixing cases can be filed in more than one jurisdiction, forum shopping is an evident result from the sharp conflict in the summary judgment standards between the circuits. The irreconcilable split within the circuits can only lead to strategic game playing as plaintiffs and defendants jockey for position on this all-critical issue of summary judgment. This irreconcilable split between the circuits generates unnecessary uncertainty in those circuits that have yet to decide this important question of procedure. In addition, it creates the specter of unequal justice in federal courts because like cases will no longer be treated alike.

Substantively, the Eighth Circuit decision makes it virtually impossible to maintain private actions against price-fixers without direct, smoking gun evidence. That gap in enforcement poses a genuine threat to the economy. Economic theory provides that prices in an interdependent oligopoly are lower than those prices that are charged by a cartel which has the real advantage of pricing as a single firm.

It makes, therefore, a huge difference what kind of market we have; for consumer welfare is compromised much more when firms collude than when they do not. Yet the Eighth Circuit's decision shows no awareness of this point, and in effect gives all cartels a pass unless there are explicit admissions of what has transpired, a rare event indeed. The risk of under-enforcement of the antitrust laws in the area of their maximum utility is one that has to be taken into account.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-1330

Blomkest Fertilizer, Inc.; Cobden Grain & Feed, on behalf of themselves and all others similarly situated;	*	
Plaintiffs,	*	
Hahnaman Albrecht, Inc.; John Peterson, doing business as Almelund Feed & Grain; Laing-Gro Fertilizers, Inc.;	*	
Plaintiffs-Appellants,	*	
Clearbrook Ag Service, Inc., on behalf of itself and all others similarly situated; Reamford Liquid Fertilizer, Inc., on behalf of itself and all others similarly situated; Tolley's Inc., on behalf of itself and all others similarly situated;	*	Appeal from the United States District Court for the District of Minnesota.
Plaintiffs,	*	
James River Farm Service, Inc., on behalf of itself and all others similarly situated;	*	

Plaintiffs-Appellants, *
*
Angela Coleman, on behalf of herself and all others similarly situated; *
*
Plaintiffs, *
*
Ag Network, Inc.; *
*
Plaintiffs-Appellants *
*
Marcelline Farm Supply, Inc., on behalf of itself and all others similarly situated; *
*
Plaintiffs, *
*
v. *
*
Potash Corporation of Saskatchewan, Inc.; Potash Corporation of Saskatchewan Sales, Inc.; Potash Company of America, Inc.; IMC Fertilizer Group, Inc.; Kalium Chemicals, Ltd.; Kalium Canada, Ltd.; Noranda Minerals, Inc.; Central Canada Potash Co.; Noranda Sales Corporation, Ltd.; Cominco, Ltd.; Cominco American, Inc.; Eddy Potash, Inc.; New Mexico Potash Corporation; *
*
Defendants-Appellees, *

Rio Algom, Ltd.;

Defendants,

PPG Canada, Limited; PPG Industries, Inc.; IMC Global;

Defendants-Appellees.

Submitted: September 13, 1999
Filed: February 17, 2000

Before WOLLMAN, Chief Judge, HEANEY, MCMILLIAN, R. ARNOLD, JOHN R. GIBSON, BOWMAN, BEAM, LOKEN, HANSEN, M. ARNOLD, and MURPHY, Circuit Judges.

BEAM, Circuit Judge.

A certified class of potash consumers appeals the district court's[1] grant of summary judgment in favor of defendants (collectively "the producers") in this action for conspiracy in restraint of trade under section 1 of the Sherman Act. We affirm.

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[1] The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota, adopting the Report and Recommendation of the Honorable Raymond L. Erickson, United States Magistrate Judge for the District of Minnesota.

I. BACKGROUND

This case involves the production and sale of potash, a mineral essential to plant growth and therefore used in fertilizer. The certified class includes all of those persons who directly purchased potash from one of the producers between April 1987 and July 1994. The class named six Canadian potash companies and two American companies.[2]

Both parties agree that the North American potash industry is an oligopoly.[3] Prices in an oligopolistic market tend to be higher than those in purely competitive markets, and will fluctuate independently of supply and demand. See Enrico Adriano Raffaelli, Oligopolies and Antitrust Law, 19 Fordham Int'l. L. J. 915, 916 (1996). Furthermore, "price uniformity is normal in a market with few sellers and homogeneous products." E.I. Du Pont De Nemours & Co. v. Federal Trade Comm'n, 729 F.2d 128, 139 (2d Cir. 1984). This is because all producers in an oligopoly must charge roughly the same price or risk losing market share.

The Canadian province of Saskatchewan is the source of most potash consumed in the United States. The province founded defendant Potash Corporation of Saskatchewan (PCS), which holds thirty-eight percent of the North American potash production capacity. As a governmental

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[2] (1) Potash Corporation of Saskatchewan, Inc. and Potash Corporation of Saskatchewan Sales, Ltd. (collectively "PCS"); (2) Cominco, Ltd. and Cominco American, Inc. (collectively "Cominco"); (3) IMC Global, Inc.; (4) Kalium Chemicals, Ltd., Kalium Canada, Ltd. and its former owner and operator, PPG Industries, Inc. and PPG Canada, Ltd. (collectively "Kalium"); (5) Noranda Mineral, Inc., Noranda Sales Corporation Ltd. and Central Canada Potash Co. (collectively "Noranda"); (6) Potash Corporation of America, Inc. and its owner Rio Algom, Ltd. (collectively "PCA"); (7) New Mexico Potash Corporation (NMPC) and its affiliate, (8) Eddy Potash Inc. (Eddy).

[3] An oligopoly is an "[e]conomic condition where only a few companies sell substantially similar or standardized products." Black's Law Dictionary 1086 (6th ed. 1990).

company, PCS had no mandate to maximize profits and was not accountable to private owners. Instead, the company was primarily concerned with maintaining employment and generating money for the local economy. Not surprisingly, PCS suffered huge losses as it mined potash in quantities that far outstripped global demand. These policies impacted the entire potash industry: during the 1980's, the price of potash fell to an historic low. In 1986, Saskatchewan voters elected a provincial government which had promised to privatize PCS. New management was appointed to PCS after the elections. Thereafter, PCS significantly reduced its output and raised its prices.

Also in 1986, New Mexico Potash Corporation (NMPC) and another American potash producer (who is not a named defendant) filed a complaint with the United States Department of Commerce. Frustrated with low potash prices, the petitioners alleged that Canadian producers had been dumping their product in the United States at prices below fair market value. In 1987, the Department issued a preliminary determination that the Canadian producers were dumping potash and ordered the companies to post bonds on all exports to the United States. These bonds were set according to each firm's calculated "dumping margin."[4] Eventually, the Department negotiated a Suspension Agreement with each of the Canadian producers. The agreement raised the price of Canadian potash in the United States by setting a minimum price at which each Canadian producer could sell in the United States.[5] That agreement remains in effect today. When the Canadian producers

[4] The dumping margin was calculated by the Department based on a comparison of the United States sale price, foreign market value, and cost of production for each producer.

[5] Under the agreement, each firm could sell potash in the United States at less than fair market value by an amount equal to 15% of its preliminary dumping margin.

entered into the Suspension Agreement, PCS announced that it was raising its prices by eighteen dollars per ton. Other producers quickly followed suit. The price of potash has remained markedly higher after the Suspension Agreement, although prices have slowly but steadily declined for the most part since the agreement was signed by the producers on January 8, 1988.

The class alleges that between April 1987 and July 1994 the producers colluded to increase the price of potash. The producers, in turn, maintain that the price increase was the product of the interdependent nature of the industry and its reaction to the privatization of PCS and the Suspension Agreement. The district court granted the producers's motions for summary judgment and the class appeals.

II. DISCUSSION

The class asserts that if we affirm the district court, we will "stand alone in holding that circumstantial evidence, even if overwhelming, cannot be used to defeat a summary judgment motion in anti-trust cases." We make no such legal history here, however, because the class's proffered evidence, far from overwhelming, fails to establish the elements of a prima facie case.

Section 1 prohibits concerted action by two or more parties in restraint of trade. 15 U.S.C. § 1. The Supreme Court in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 & 768 (1984) and Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986), provided the standard used to determine whether the plaintiffs's evidence of a section 1 violation survives a summary judgment motion. In order to state a section 1 case, plaintiffs must present evidence that "tends to exclude the possibility of independent action" by the defendants. Monsanto, 465 U.S. at 768. This means that conduct that is "as consistent with permissible [activity] as with illegal conspiracy does not, standing alone,

support an inference of antitrust conspiracy." Matsushita, 475 U.S. at 588. We are among the majority of circuits to apply Monsanto and Matsushita, broadly, and in both horizontal and vertical price fixing cases. See The Corner Pocket of Sioux Falls, Inc. v. Video Lottery Tech., Inc., 123 F.3d 1107, 1109 (8th Cir.1997), cert. denied, 118 S. Ct. 1054 (1998). Applied in this case, the standard requires that if it is as reasonable to infer from the evidence a price-fixing conspiracy as it is to infer permissible activity, then the plaintiffs's claim, without more, fails on summary judgment.

The class's price-fixing claim is based on a theory of conscious parallelism. Conscious parallelism is the process "not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests." Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993). The class points out that the producers's prices were roughly equivalent during the alleged conspiracy, despite differing production costs. It further points out that price changes by one producer were quickly met by the others. This establishes only that the producers consciously paralleled each other's prices.

Evidence that a business consciously met the pricing of its competitors does not prove a violation of the antitrust laws. See Theatre Enter., Inc. v. Paramount Film Distrib. Corp., 346 U. S. 537, 540-41(1954). Particularly when the product in question is fungible, as potash is, courts have noted that parallel pricing lacks probative significance. See Bendix Corp. v. Balax, Inc., 471 F.2d 149, 160 (7th Cir. 1972). An agreement is properly inferred from conscious parallelism only when certain "plus factors" exist. See In re Baby Food Antitrust Litigation, 166 F.3d 112, 122 (3d Cir. 1999); see, e.g., Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 884 (8th Cir. 1978) (requiring evidence that defendant acted contrary to self-interest in addition to evidence of

conscious parallelism to establish antitrust violation). A plus factor refers to "'the additional facts or factors required to be proved as a prerequisite to finding that parallel [price] action amounts to a conspiracy.'" In re Baby Food, 166 F.3d at 122 (quoting 6 Phillip E. Areeda, Antitrust Law § 1433(e) (1986)).

A plaintiff has the burden to present evidence of consciously paralleled pricing *supplemented with* one or more plus factors. See Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1456 n.30 (11th Cir. 1991). However, even if a plaintiff carries its initial burden, a court must still find, based upon all the evidence before it, that the plaintiffs evidence tends to exclude the possibility of independent action. See Monsanto, 465 U.S. at 764 & 768; Matsushita, 475 U.S. at 588; see also In re Baby Food, 166 F.3d at 122. As noted, the class identified parallel pricing. The class also asserts that it has established the existence of three plus factors: (1) interfirm communications between the producers; (2) the producers's acts against self-interest; and (3) econometric models which purport to prove that the price of potash would have been substantially lower in the absence of collusion. The evidence underlying these assertions, however, does not bear the weight the class places upon it.

A. Interfirm Communications

The class alleges a high level of interfirm communications between the producers and complains most vociferously about price verification information. Courts have held that a high level of communications among competitors can constitute a plus factor which, when combined with parallel behavior, supports an inference of conspiracy. See, e.g., In re Plywood Antitrust Litigation, 655 F.2d 627, 633-34 (5th Cir. Unit A Sept. 1981). However, the evidence presented by the class here is far too ambiguous to support such an inference. Considering the proof as a whole, the

evidence of interfirm communications does not tend to exclude the possibility of independent action, as required under Monsanto and Matsushita, since other significant events strongly suggest independent behavior. The fundamental difficulty with the class's argument regarding price verifications is that it assumes a conspiracy first, and then sets out to "prove" it. However, a litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly.

The class's evidence shows that the communications include meetings at trade shows and conventions, price verification calls, discussions regarding a Canadian potash export association, and the like. Taking the class's evidence as true, roughly three dozen price verifications occurred between employees, including high-level sales employees, of different companies, over at least a seven-year period. In large part, these contacts involved the verification of prices the companies had already charged on particular sales. The impotence of this circumstantial evidence is that it bears no relationship to the price increases most in question because it lacks the logical link necessary to infer such a relationship.

The class alleges that the price-fixing conspiracy began "at least as early as April, 1987." Complaint at 11. In 1987, the price for potash was at historically low levels, such that producers were losing millions of dollars. Then, a sudden and dramatic increase in price by PCS occurred on September 4, 1987, and approximately a week later the remaining producers followed suit.[6] The class argues that the large and parallel price increases together with nearly simultaneous price verifications create an inference sufficient to survive summary judgment.

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[6] This price increase was rescinded in the wake of the Suspension Agreement. In its place came a much smaller increase by PCS on January 11,1988–three days after the Suspension Agreement created a price floor–which pricing decision was followed thereafter by the remaining producers.

The problem with this theory, as indicated, is that the price verification communications only concerned charges on particular completed sales, not future market prices. There is no evidence to support the inference that the verifications had an impact on price increases. The only evidence is that prices were possibly cut as a result. "[T]o survive summary judgment, there must be evidence that the exchanges of information had an impact on pricing decisions." In re Baby Food, 166 F.3d at 125 (citing Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1357 (9th Cir. 1982)). There is no evidence here that price increases resulted from any price verification or any specific communication of any kind. *Subsequent* price verification evidence on particular sales cannot support a conspiracy for the setting of a broad market price on September 4, 1987.

Even if we were to find the price verification evidence relevant, when considered with all the facts, it does not tend to exclude the possibility of independent action. To the contrary, there is strong evidence of independent action. Just before and concurrent with the suspect price increases, the following occurred: the price of potash was at historic lows and the producers were losing millions; potash companies in the United States complained to the United States Department of Commerce that the Canadian producers were dumping potash at well-below market value; the Department of Commerce made a preliminary determination that the Canadian producers were dumping and required expensive bonds for all imports; the industry leader, the government-founded PCS, hired new management and began privatization with the goal of becoming profitable; legislation was passed in the province of Saskatchewan–the source of nearly all United States potash–that provided for the setting and prorating of potash production; potash producers reached a Suspension Agreement with the Department of Commerce that set price floors for potash; and PCS was finally privatized and significantly reduced its output. In the face of these

circumstances and with the price leadership of PCS in this oligopolistic industry, it would have been ridiculous for the remaining companies to not also raise their prices in a parallel fashion. Thus, we find the class's weak circumstantial evidence that the dramatic increases were the result of a price-fixing agreement is not sufficient to survive summary judgment.

This leaves only the question whether there is sufficient evidence to support an agreement to stabilize and maintain prices in violation of section 1 of the Sherman Act. The class's evidence of an agreement to maintain the price of potash at an artificially high level after the initial price increases is again the parallel pricing and price verifications. Parallel pricing has been conceded, leaving the burden once again on the verifications. Common sense dictates that a conspiracy to fix a price would involve one company communicating with another company *before* the price quotation to the customer. Here, however, the class's evidence consists solely of communications to verify a price on a *completed* sale. The price verifications relied upon were sporadic and testimony suggests that price verifications were not always given. The fact that there were several dozen communications is not so significant considering the communications occurred over at least a seven-year period in which there would have been tens of thousands of transactions. Furthermore, one would expect companies to verify prices considering that this is an oligopolistic industry and accounts are often very large. We find the evidence falls far short of excluding the possibility of independent action.

In re Baby Food, 166 F.3d at 112, aptly illustrates why the communications complained about here are inadequate to exclude the possibility of independent action by the producers. The defendants, nationally prominent corporations with ninety-eight percent of the baby food business, were Gerber, H.J. Heinz, and Beech-Nut. It is true that the numerous intercompany pricing communications found by the

Third Circuit to be *insufficient* to support a section 1 violation were characterized in one part of the opinion as price discussions among low-level employees. See id. at 125. However, deposition testimony in that case revealed that district sales employees and district sales managers of Heinz "were required to submit competitive activity reports to their superiors concerning baby food sales from information they picked up from competitor sales representatives." Id. at 118-19. This same line of testimony revealed that supervising managers for Heinz informed district managers "on a regular basis before any announcement to the trade as to when Heinz's competitors were going to increase [their] wholesale list prices." Id. at 119. The president of Beech-Nut "testified that it was [Beech-Nut's] policy for sales representatives to gather *and report* pricing information of [Beech-Nut's] competitors." Id. (emphasis added). Indeed, the In re Baby Food case is replete with evidence that pricing information was systematically obtained and directed to high-level executives of Gerber (including Gerber's vice president of sales), Beech-Nut and Heinz, the principal national competitors in the baby food industry.

The evidence in the case shows that a carefully conceived and effective system of price information gathering for the benefit of corporate executives was at all relevant times alive and well in the baby food industry. Notwithstanding communications that far surpassed any information exchanges established in this case, the Third Circuit applied Matsushita and granted summary judgment to the defendants, in large part because there was no evidence that the exchanges of information had an impact on pricing decisions. See In re Baby Food, 166 F.3d at 125. As earlier stated, there likewise is absolutely no such evidence in this litigation, only speculation.

The class directs our attention to In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599, 614 (7th Cir.), cent. denied, 118 S. Ct. 1178 (1998), in which the

plaintiffs, like the class, searched through an enormous quantity of discovery material and culled out a number of suspicious interfirm communications. The court in Brand Name described these documents produced as "smoking guns." Id. By contrast, the communications here are facially innocent contacts which are, at most, ambiguous on the question of whether the producers schemed to set prices.

The class argues that a memorandum issued by Canpotex, a lawful Canadian cartel that sets prices for potash sold outside of the United States, is the class's "smoking gun." This memorandum, dated January 8, 1988, and directed to its "agents and offices" reads in pertinent part:

> FYI Canadian potash producers have reached agreement with the United States Department of Commerce and all dumping action has been suspended for minimum 5 years. It is rumoured that the USD 35.00 per metric ton increase posted by Canadian producers in 1987 to cover possible tariff payments to the U.S. Govt will be refunded in full or part. In the meantime new price lists are being issued on Monday Jan. 11 at:
>
> | | |
> |---|---|
> | Standard Grade | USD 80.00 |
> | Coarse Grade | USD 84.00 |
> | Granular Grade | USD 86.00 |

Appellants's Joint App. at 910.

The class asserts that this memorandum establishes an agreement to fix prices. The class argues that the people who received the January 8, 1988, memorandum were all high-ranking officials in the producers's companies who were on the Board of Directors of Canpotex, and therefore, the memorandum is evidence that tends to exclude an inference that the producers acted independently.

The magistrate judge disagreed that this memorandum was sufficient evidence to exclude the possibility that the producers acted independently. The magistrate judge first noted that PCS had also announced the same prices in a telex to its customers on January 8, 1988, and thus the possibility that Canpotex learned of the price list from a customer of PCS could not be excluded. In re Potash Antitrust Litigation, 954 F. Supp. 1334, 1366 (D. Minn. 1997) . Further, the magistrate judge discovered that while most of the Canadian defendants had matched the prices in the memorandum by January 22, 1988, they did not uniformly issue price lists matching those prices on January 11, 1988, and one producer, Kalium, did not match those prices at all. See id. However, as the magistrate judge pointed out, "evidence that the alleged conspirators were aware of each other's prices, before announcing their own prices, 'is nothing more than a restatement of conscious parallelism,' which is not enough to show an antitrust conspiracy." Id. (quoting Market Force Inc. v. Wauwatosa Realty Co., 906 F.2d 1167, 1172 (7th Cir.1990)). See also Weit v. Continental Ill. Nat'l Bank and Trust Co., 641 F.2d 457, 462 (7th Cir. 1981) (mere opportunity to conspire even in context of parallel business conduct not necessarily probative evidence of price-fixing conspiracy).

We agree with the magistrate judge's finding that this document was not sufficient evidence to exclude an inference that the producers acted independently. First, the memorandum was written by R.J. Ford and directed to "agents and offices." Appellants's Joint App. at 910. It is not at all clear who this memorandum was sent to or received by, and a thorough review of the appellants's voluminous joint appendix has not clarified this point. Dozens of these high ranking officials were deposed during pretrial discovery, and according to the documents submitted by the class in its joint appendix, only one person, Dave Benusa, was asked if he received "any document dated the 8th of January 1988

concerning pricing." Appellants's Joint App. at 970. Benusa was manager of marketing for Cominco American in 1988. Benusa stated in his deposition that he did not receive any document dated January 8, 1988, concerning pricing. The class apparently did not depose the author of the memorandum, R.J. Ford, nor did they make any further attempt that we can find to identify who received this "smoking gun" piece of evidence. Another document produced by Canpotex, an interoffice memorandum dated September 8, 1993, is actually directed to "Members of the Board of Directors of Canpotex Limited." Appellants's Joint App. at 911. We assume that had the January 8,1988, memorandum been intended for the members of the board of directors, it likewise would have so stated.

Furthermore, even if, as the class asserts, the memorandum had been received by high-ranking officials in the producers's companies, we agree with the magistrate judge's reasoning that the memorandum does not assist the class in proving the existence of a conspiracy. As the magistrate judge pointed out, the producers did not uniformly increase prices to match the memorandum on January 11, 1988, and furthermore, one producer, Kalium, did not match the memorandum price at all. The fact that most of the producers did increase prices to match the PCS price increase of January 11,1988, is not surprising in a market where conscious parallelism is the norm. Despite submitting a five-volume joint appendix, the class has failed to present evidence about this memorandum which tends to exclude the possibility of independent action by the producers. As it turns out, the "smoke" from this gun is barely, if at all, discernible.

Finally, the class asserts that the producers signaled pricing intentions to each other through advance price announcements and price lists. The Supreme Court has held, however, that "the dissemination of price information is not itself a per se violation of the Sherman Act." United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 113 (1975).

As we noted at the outset, the class may not proceed by first assuming a conspiracy and then setting out to prove it. If the class were to present independent evidence tending to exclude an inference that the producers acted independently, then, and only then, could it use these communications for whatever additional evidence of conspiracy they may provide. As the record stands, we find these contacts far too ambiguous to defeat summary judgment. See The Corner Pocket, 123 F.3d at 1112.

B. Actions Against Self-interest

Evidence that defendants have acted against their economic interest can also constitute a plus factor. See, e.g., Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1243-45 (3d Cir. 1993) (denying defendants's motion for summary judgment where defendants refrained from bidding aggressively on accounts already serviced by other defendants). However, where there is an independent business justification for the defendants's behavior, no inference of conspiracy can be drawn. See Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1456-57 (11th Cir. 1991).

The only evidence of actions against interest that the class has identified is the producers's uniform participation in the Suspension Agreement.[7] The class argues that those producers with low dumping margins could have undercut other producers's prices and gained market share while still maintaining prices at profitable levels. Instead, the low tariff producers joined the Suspension Agreement. The class further

[7] The class also asserts that PCS acted against its self-interest when it agreed to supply potash to PCA when PCA's mine flooded. This agreement occurred in February 1987, before the class contends the conspiracy ever began. It is, therefore, of little relevance to this case.

posits that NMPC's[8] failure to object to the agreement was an action against selfinterest.

In response, the producers point out that Department of Commerce investigations are unpredictable, and participation in the agreement reduced uncertainty. Furthermore, without the Suspension Agreement, even low tariff producers would have been required to post substantial bonds which would have caused considerable capital drain on corporate coffers. Like the Canadian producers, NMPC was uncertain about the ultimate outcome of the Department of Commerce's investigation. Under the Suspension Agreement, NMPC obtained certainty and a higher price for potash sold in the American market. This is the relief NMPC initially sought, and it is unsurprising that NMPC would not oppose such an outcome.

The class has thus failed to carry its burden to rebut the producers's independent business justification for their actions. See Laurel Sand & Gravel, Inc. v. CSX Transp. Inc., 924 F.2d 539, 543 (4th Cir. 1991). There is nothing in this record that contradicts the conclusion that ending the dumping investigation with a settlement that required unreasonably low potash prices to rise was a legitimate business decision for the low tariff producers. They benefitted from increased revenues, while avoiding the cost of litigation and the risk of penalties. This cannot be construed as an act against self-interest.

C. Expert Testimony

Finally, the class argues that its expert's econometric model provided crucial confirmation that the prevailing potash prices during the alleged conspiracy were above those

[8] The class also asserts that failure to object to the Suspension Agreement was contrary to Eddy's self-interest. This argument is puzzling because Eddy was not in existence at the time of the agreement and thus could hardly have objected to it.

expected in the absence of collusion. While their expert concedes that the prices have primarily steadily decreased[9] since January 8, 1988, he asserts that prices would have been much lower absent an agreement to fix prices. We need not decide whether such evidence, in a proper case, could constitute a plus factor, because we find the report in this case is not probative of collusion.

The class's expert evidence is lacking in two crucial respects. First, the expert admits that his model fails to take into account the dramatic events of 1986. In his deposition, the class's expert confirmed that his model considers neither the privatization of PCS nor the anti-dumping proceedings. It is beyond dispute that even without collusion, those events would have led to higher potash prices. A model that does no more than report that prices did, indeed, rise after these events tells us nothing about the existence of industry collusion.

A second flaw in the expert's report, as the magistrate judge noted, is that it relies almost exclusively on evidence (such as the producers's common membership in trade

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[9] It has been suggested that in the context of a price-fixing agreement among several producers in an oligopoly, the price actually would decrease somewhat over time because individual producers would attempt to "cheat" on the agreement by slightly lowering prices. Our review of the learned treatises on oligopolies and antitrust law does not seem to bear this theory out. First, there is very little discussion of the phenomenon of steadily *lowering* prices in an alleged price-fixing conspiracy. Second, several commentators have suggested that the incentive to lower prices while other oligopolists maintain prices deters collusion in the first place. See Jonathan B. Baker, Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory, 38 Antitrust Bull. 143,151(1993) (analyzing George Stigler's 1964 article, A Theory of Oligopoly, 72 J. Pol. Econ. 44 (1964) and recognizing that "the unilateral incentive to deviate on a cooperative arrangement to fix price... is the very market force by which competition insures low prices and high output"); see also Donald F. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. Law Rev. 655, 660 (1962) (noting that ***without*** an agreement among oligopolists, the pressure to cut prices is irresistible).

associations and their publication of price lists to customers) that is not probative of collusion as a matter of law. Under Federal Rule of Evidence 703, the facts underlying an expert's opinion need not be admissible if they are "of a type reasonably relied upon by experts in a particular field." The rule, however, contemplates that there will be "sufficient facts already in evidence or disclosed by the witness as a result of his or her investigation to take such expert opinion testimony out of the realm of guesswork and speculation." Hurst v. United States, 882 F.2d 306, 311 (8th Cir. 1989) (quotation omitted). In this case, the expert's model is fundamentally unreliable because of his heavy (if not exclusive) reliance on evidence that is not probative of conspiracy, coupled with his failure to consider significant external forces that served to raise the price of potash. See Loudermill v. Dow Chem. Co., 863 F.2d 566, 570 (8th Cir. 1988).

III. CONCLUSION

We have carefully considered each of the class's other arguments and find them to be without merit. The class has failed to present evidence of collusion sufficient to create a genuine issue of material fact. The producers are therefore entitled to summary judgment. For the foregoing reasons, the decision of the district court is affirmed.

JOHN R. GIBSON, Circuit Judge, dissenting, with whom HEANEY, McMILLIAN, RICHARD, S. ARNOLD, and MURPHY, Circuit Judges, join.

I dissent.[10]

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[10] Four producers present special reasons entitling them to summary judgment. As to Noranda, New Mexico Potash Corporation, Eddy Potash and PPG, I concur in the judgment for the reasons discussed in the panel opinion at 176 F.3d 1055, 1071-72 (8th Cir. 1999).

The Court today rejects circumstantial evidence of conspiracy and requires direct evidence to withstand summary judgment in an antitrust case. The court's requirement of direct evidence is contrary to Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 768 (1984), which only required "direct or circumstantial evidence that reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve an unlawful objective." (Emphasis added). Because conspirators cannot be relied upon either to confess or to preserve signed agreements memorializing their conspiracies, the court's requirement for direct evidence will substantially eliminate antitrust conspiracy as a ground for recovery in our circuit.

The potash industry is an oligopoly in which the producers ended a price war and raised prices dramatically. The question is whether the class has shown that the new prices resulted from an agreement among the producers to raise and stabilize prices, rather than from independent reactions to market conditions combined with actions of the United States and Canadian governments. I believe that the class has satisfied the existing standards for circumstantial proof that the prices resulted from collusion.

The market for potash in the United States is dominated by Canadian firms. In 1986, 84.3 per cent of the potash consumed in the United States was imported from Canada. The principal Canadian potash producers are defendants in this case: Potash Corporation of Saskatchewan Incorporated (PCS); Potash Corporation of America (PCA); IMC Fertilizer Group, Inc.; Kalium; Noranda Minerals, Inc.; and Cominco. These Canadian firms are allied in Canpotex, a cartel that exists to sell potash outside the United States.

Potash is a mineral that is an essential ingredient in fertilizer. Because potash is an essential ingredient, the demand for potash is "inelastic," meaning that people will continue to buy it even if the price goes up, and they will not buy much more, even if the price goes down. The effect of

this inelastic demand is that low prices are bad for the producers because the low price does not result in greater sales, except insofar as one producer can take sales away from other producers. Conversely, producers benefit from high prices, because they can sell about as much potash and keep the extra money. Newcomers cannot enter the market without first gaining control of a potash mine, which is a significant entry barrier preventing new sellers from entering the market.

The biggest of the Canadian producers, PCS, was originally owned by the province of Saskatchewan and was run as a governmental company for the avowed purposes of providing jobs and promoting the local Saskatchewan economy. Unfortunately for the potash industry, due to a slump in agriculture, potash demand fell tremendously in the 1980's, resulting in oversupply. The effect of the oversupply was a potash price war, with prices bottoming in 1986 when PCS charged C$45.36 per ton FOB mine. The industry was in crisis. PCS alone lost $103 million in 1986. The president of PCS Sales wrote in an internal memorandum that the industry would not be able to end the price war without "joint action":

> It is not possible for a single producer to affect [sic] a turn-around; however, joint action by a group of producers or governments could achieve this.
>
> Given the competitive nature of the business, joint action in North America is not possible except through a vehicle such as Canpotex.
>
> Canpotex by itself cannot achieve the objectives unless there is tacit approval and support on the part of other potash exporters. The danger inherent in multilateral decisions by Canpotex (or PCS Sales) is that the world will again see us as a residual supplier.... PCS Sales' past support of price with a

view to achieve stability is proof of the fallacy of such attempts.

In fact, Noranda, Kalium, PCA, and PCS had each tried to increase prices unilaterally during 1986 and were forced to rescind the increases when the other producers undercut them.

In 1986, the province of Saskatchewan elected a government which promised to privatize PCS. In preparation for privatizing the company, PCS replaced its management with Charles Childers, CEO, and William Doyle, sales chief, who came to PCS from rival company IMC. Childers was quoted in a trade publication as saying that it was incumbent on PCS "to lead" in order to "straighten out our own company and hopefully give some strength to the potash industry as a whole."

Also in 1986, two American producers filed a complaint with the United States Department of Commerce alleging that the Canadian companies were dumping potash in the United States at less than fair value (which can mean below prices charged for exports to a third country, below domestic prices in the country where the product is produced, or below a reconstructed cost of production, see David G. Haglund and Alex von Bredow, U.S. Trade Barriers and Canadian Minerals: Copper, Potash and Uranium 65). The Department investigated the claim and in August 1987 issued a preliminary determination that the Canadian producers were dumping potash. The Department ordered the Canadian companies to post bonds on all exports to the United States, which would be payable to the United States as a duty if there were a final determination of dumping and injury to American producers. The amount of the bond varied for each firm according to the firm's "dumping margin," that is, the average amount by which the firm's United States sale price fell below the foreign market value in the cases examined by the Department. The dumping margins varied wildly, from

9.14 percent for IMC up to a crippling 85.2 percent for Noranda.

The Saskatchewan government responded to the United States action by adopting legislation which would give the province the power to limit and prorate production among Saskatchewan producers. See Haglund and von Bredow, supra, at 76. Within days of the introduction of the Saskatchewan legislation, on September 4, 1987, PCS announced that it would increase its prices by $35 per ton (from $58 to $93 per short ton for coarse grade FOB mine) to account for the bond expense. PCS's dumping margin was set at 51.9 per cent. PCS chose to raise its price only by $35, the amount necessary to pay duties on the industry average dumping margin of 36.62 per cent, rather than by the amount necessary to pay its own duty of 51.9 percent. It is undisputed that PCS chose the industry average figure in an attempt to pick a figure that other producers would follow. On September 11, 1987, the other Canadian producer defendants all[11] announced either a $35 price increase or a new price of $93, rather than simply increasing the price by the amount necessary to cover their individual duty costs.

On January 8, 1988, the Canadian producers reached an agreement with the Department of Commerce, suspending the earlier order. The suspension agreement imposed a minimum price on Canadian producers selling in the United States market, but oddly, the minimum price chosen was still less than the "foreign market value": the Canadians were only forbidden from undercutting "foreign market value" by more than fifteen percent of the producer's dumping margin. See Haglund and von Bredow, supra, at 88. The literal terms of the suspension agreement made each producer's minimum price vary with its own foreign market value (which was

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[11] The PCA price list is dated September 16, 1987, but a September 11 memo to the file by vice president John Ripperger refers to the price increase as having already taken place.

arrived at by different methodologies for different firms) and with its own dumping margin, as the producers' expert William Barringer opined, the "uncertainties" in such a calculation make it impossible to predict with accuracy what price for any particular transaction would be in compliance with the agreement. However, correspondence from the Department of Commerce, which had responsibility for monitoring compliance with the suspension agreement, indicates that the Department used an industry average figure in assessing compliance.

As soon as the suspension agreement was in place, PCS again led the way in determining industry pricing, announcing it would rebate the earlier $35 surcharge, and on January 11, 1988, publishing its new price list at $86 per ton for granular grade, a net increase of $28 over the $58 it charged before the Department of Commerce imposed the bond requirement. The other Canadian producers matched PCS's increase within 11 days, and Kalium raised its price to $87. The Department of Commerce, in monitoring compliance with the agreement, noted that the agreement imposed an average floor price of $60.67, and that in the five months following the agreement the average price charged was $79.28.

The class's expert, Professor Gordon Rausser, opined and presented data purporting to show that the industry average prices for potash were higher than would be expected based on market factors during the 1988-1993 period (i.e., prices were "supra-competitive"). Perhaps more to the point, prices remained significantly higher than the minimum prices imposed by the suspension agreement from 1988 to 1992, with the exception of a short period in 1990 after PCS cut its prices drastically (and temporarily) for the avowed purpose of stabilizing prices within the industry.[12] Only in January and

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[12] The Court argues that Professor Rausser does not take into account the effect of the antidumping proceedings, and his testimony is thus irrelevant. Supra at 17. But Rausser's price level evidence specifically includes the prices that he contends would be required under the

February 1990, in the wake of this "market correction," did prices briefly dip below the suspension agreement price floor.

I.

This is a circumstantial evidence case based on parallel pricing, an example of the economic phenomenon called "conscious parallelism," in which competitors act alike. "[C]onscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts." Donald F. Turner, The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 658 (1962). The threshold question in deciding whether parallelism could be evidence of an agreement is whether the parallelism is "interdependent," meaning that the sellers would only take the course of action they took if they expected the others to behave the same way. Id. In this case interdependence is obvious; no producer would have been able to raise prices and keep them high unless the others did.

According to accepted economic theory, oligopolies are characterized by interdependent behavior because each seller is a big enough player to affect the market by price cuts; as a result, in raising or lowering prices or output, each seller must take into account his competitors' responses to his action. See Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and its Practice 37 (1994); Turner, supra at 665. In an oligopoly, price rises are not sustainable as long as one major seller continues to undercut the price leader and steal his customers. When one seller raises his price, no buyers will buy his product unless the other sellers follow the price leader and raise their prices. The other oligopolists know that if they keep their prices low, the brave price leader will simply cut

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anti-dumping suspension agreement. Therefore, he clearly does take into account the effect of the anti-dumping proceedings.

his prices and the battle will resume. On the other hand, if they raise their prices in turn, all sellers will receive higher prices and end up with more money in their pockets. See Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 484 (1st Cir. 1988) (Breyer, J.). The loser will be the consumer, who benefits from competition, not peaceful coexistence between suppliers.

Even though oligopoly pricing harms the consumer in the same way monopoly does, interdependent pricing that occurs with no actual agreement does not violate the Sherman Act, for the very good reason that we cannot order sellers to make their decisions without taking into account the reactions of their competitors. See Turner, supra, at 665-68. As then-Judge Breyer explained:

> Courts have noted that the Sherman Act prohibits agreements, and they have almost uniformly held, at least in the pricing area, that such individual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do not constitute an unlawful agreement under section 1 of the Sherman Act. That is not because such pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy for "interdependent" pricing. How does one order a firm to set its prices without regard to the likely reactions of its competitors?

Clamp-All, 851 F.2d at 484 (emphases in original) (citations omitted).

Although interdependent pricing tends to happen naturally in an oligopoly, there are good reasons for competitors to enter into an actual agreement to fix prices. First, successful price coordination requires accurate predictions about what other competitors will do; it is easier

to predict what people mean to do if they tell you. In the absence of express agreements, oligopolists

> must rely on uncertain and ambiguous signals to achieve concerted action. The signals are subject to misinterpretation and are a blunt and imprecise means of ensuring smooth cooperation, especially in the context of changing or unprecedented market circumstances. This anticompetitive minuet is most difficult to compose and to perform, even for a disciplined oligopoly.

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227-28 (1993). Second, competitors may have different preferences on decisions such as pricing and therefore may not be willing just to follow a leader's decision; words (or word substitutes) may be necessary to negotiate a common course of action. Third, some oligopoly markets are more conducive than others to supra-competitive pricing. Market traits that make oligopoly pricing more likely to succeed include a standardized product and publicly announced prices, which make it easier for sellers to keep track of each others' prices. See Hovenkamp, supra, at 171. Actual agreement allows competitors to modify their market to facilitate collusion, particularly by setting up procedures for detecting and punishing price-cutting.

While the oligopoly market structure naturally facilitates supra-competitive pricing, that same market structure also makes cooperative arrangements unstable, for this reason: It is in the best interest of each individual competitor for his competitors to charge high prices, while he charges somewhat less when that will help him steal customers from his competitors. See George J. Stigler, A Theory of Oligopoly, 72 J. Pol. Econ. 44, 46 (1964) ("Let us assume that the collusion has been effected, and a price structure agreed upon. It is a well-established proposition that if any member of the

agreement can secretly violate it, he will gain larger profits than by conforming to it."). The temptation to shade prices secretly is just as inherent in the oligopoly market structure as the temptation to collude to raise prices. See Hovenkamp, supra, at 140-41; Jonathan B. Baker, Two Sherman Act Section 1 Dilemmas: Parallel Pricing the Oligopoly Problem, and Contemporary Economic Theory, 38 Antitrust Bulletin 143, 154 (1993). Of course, if the competitors know about the undercutting, they will match it. See Stigler, supra, at 46. Therefore, price-shading and secrecy must go hand in hand. While publicly announced prices discourage the sellers from cutting prices because they know that their price cuts will be matched, thus eliminating any competitive advantage, conversely, secretly negotiated discounts encourage price-cutting, since each seller hopes to steal customers without suffering retaliation from its competitors. See Hovenkamp, supra, at 141. As a result, a cartel can only succeed for any period of time if it has the ability to detect cheating and punish it effectively. See id.; Jacob Blinder & Sons, Inc. v. Gerber Prods. Co. (In re Babyfood Antitrust Litig.), 166 F.3d 112, 137 (3d Cir. 1999) (without a mechanism to detect conspirator cheating, no conspiracy could long endure); JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 777 (7th Cir. 1999) (oligopoly market where cheating can be detected is "ripe" for collusion).

If the oligopolists agree, either tacitly or expressly, to coordinate price increases, they have committed a per se violation of section 1 of the Sherman Act. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 212-18 (1940) (agreement to fix prices per se illegal); American Tobacco Co. v. United States, 328 U.S. 781, 809-10 (1946) (agreement need not be express as long as there is unity of purpose or "common design and understanding"). From the outside, however, the conspirators' actions may look the same as innocent oligopoly pricing. Although parallel pricing evidence is consistent with illegal conduct, it is equally

consistent with lawful conduct, and thus does not tend to exclude the possibility of independent action, as required by Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984). Therefore, parallel pricing in a concentrated market cannot make a submissible section one case, although it may set the groundwork for such a case. See State of Arizona v. Standard Oil Co. (In re Coordinated Pretrial Proceedings), 906 F.2d 432, 444 (9th Cir. 1990) ("We recognize that such interdependent pricing may often produce economic consequences that are comparable to those of classic cartels. Nonetheless, proof of such pricing, standing alone, is generally considered insufficient to establish a violation of the Sherman Act.").

In a rather primitive way, the "plus factors" test incorporates the economic principles outlined above as a way to distinguish between innocent interdependence and illegal conspiracy. Under this test, plaintiffs can establish a prima facie case of conspiracy by showing parallel prices together with "plus factors" that increase the likelihood that the parallel prices resulted from conspiracy. See, e.g., Wallace v. Bank of Bartlett, 55 F.3d 1166, 1168 (6th Cir. 1995); Petruzzi's IGA Supermarkets. Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1232-33 (3d Cir. 1993); Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1456 n.30 (11th Cir. 1991); Apex Oil Co. v. DiMauro, 822 F.2d 246, 253-54 (2d Cir. 1987).

We must, of course, take care to interpret the "plus factors" test in a way that is consistent with Monsanto. With Monsanto in mind, it is useful to distinguish between "plus factors" that establish a background making conspiracy likely and "plus factors" that tend to exclude the possibility that the defendants acted without agreement. For instance, "motive to conspire" and "high level of interfirm communications," are often cited as "plus factors" because they make conspiracy possible. See, e.g., Apex Oil, 822 F.2d at 254. Background facts showing a situation conducive to collusion do not tend

to exclude the possibility of independent action, see id., but they nevertheless form an essential foundation for a circumstantial case. In Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 593-98 (1986), the Supreme Court held that a conspiracy case based on circumstantial evidence must be economically plausible. The background "plus factors" of market structure, motivation and opportunity play an important role in establishing such plausibility. Generally, these background "plus factors" are necessary but not sufficient to prove conspiracy.[13]

On the other hand, acts that would be irrational or contrary to the defendant's economic interest if no conspiracy existed, but which would be rational if the alleged agreement existed, do tend to exclude the possibility of innocence. See Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 884 (8th Cir. 1978); Re/Max Internat'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1009-11 (6th Cir. 1999), petition for cert. filed, 68 U.S.L.W. 3138 (Aug. 17, 1999) (No. 99-294); City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 570-71 and n.35 (11th Cir. 1998), cert. denied, 120 S. Ct. 3309 (1999).

A.

Of the "plus factors" that merely make conspiracy possible, such as motive and opportunity to conspire, the class has adduced abundant evidence. Within this category some "plus factors" are purely situational, involving no action on the part of the defendant, and some are volitional; while the

[13] It is possible that some types of evidence not logically inconsistent with innocence, such as a high level of interfirm communications, could become so unusual that they suffice to make a prima facie case. See City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 570-73 (11th Cir. 1998) (incumbency rate on new contracts so high it was inconsistent with independent action), cert. denied, 120 S. Ct. 309 (1999).

former are important, the latter begin to make the required showing of collusion.

The purely situational factors in this case are the market structure and the crisis in the potash industry. The structure of the potash market was conducive to collusion, featuring an oligopoly, barriers to new sellers entering the market, inelastic demand, and a standardized product. See JTC Petroleum, 190 F.3d at 777 (market with these features is ripe for collusion). However, there was excess production capacity, which spurs competition, and a price war, which shows the producers had not been able to achieve a stable interdependent equilibrium. Individual attempts in 1986 by Noranda, Kalium, PCA, and PCS to initiate a price rise had failed. The producers were losing millions of dollars. The producers had good reason to wish for a truce.

The volitional background "plus factors" are also very strong in this case. At least one of the defendants actively considered the possibility of joint action, as is stated in the PCS "Corporate Plan" document dated September 25, 1986: "It is not possible for a single producer to affect [sic] a turn-around; however, joint action by a group of producers or governments could achieve this." Then there was a break in pattern, as the market went from price-war to profitability. See Turner, supra, at 672 ("Even in markets with few sellers, a fairly sudden change in pricing patterns is ground for suspicion.").

The class has introduced significant evidence of solicitations to enter a pricefixing agreement. Most, but not all, of the solicitations were by PCS. For instance, PCS freely complained to Kalium about Kalium's failure to adhere to pricing cut-offs. It was the custom in the industry to give lower prices at times of year when there was no immediate need for fertilizer, but to raise prices during high-use periods. Kalium published price lists announcing the pricing cut-off pattern, but in fact often shipped at the lower price after the cut-off date when it did not get orders filled before the cut-off

date. PCS sales chief William Doyle repeatedly upbraided Kalium's vice president Robert Turner for shipping at the lower price after the cut-off date. Turner responded "something to the effect" that he would run his own business. Another time, Doyle called Turner and advised him that neither PCS, IMC, nor Cominco planned to accede to a certain customer's request to delay filling an order-that is, to ship at the old price after the cut-off. Turner answered that Kalium would try to ship by a certain date, as it had already said it would do in a letter to its customers. In the same vein, Doyle approached Turner about a certain bid and told Turner that Kalium's action was "wrong." John Ripperger, vice president of PCA, also testified that Doyle asked him if PCA was going to institute a price increase and not carry over product at the old price; Ripperger interpreted this question to mean that Doyle "would prefer that we don't make sales at the old price." Also, Doyle complained to Ripperger that PCA's pricing was undermining prices in Florida. Ripperger reported a conversation in which Gary Snyder of PCS asked a PCA salesman if he had sold at a certain price, and then said, "We [PCS] will take it [price] down and bury you [PCA] if that's what you want"

In 1988, after the sale of Kalium, Charles Childers, the CEO of PCS, called on Jay Proops, one of Kalium's new owners, armed with a chart showing that PCS was losing market share and that Kalium and other producers were gaining. Childers said Kalium was undercutting the price. Proops did some research and concluded that the chart had incorrect information and that Kalium was not undercutting. Therefore, Proops took no action in response to Childers's visit. In August 1990, Childers telephoned Joseph Sullivan, the other owner of Kalium. Childers told Sullivan that PCS's "price leadership was not working, despite major efforts" and that Childers "wanted to discuss this issue" with Sullivan. Sullivan declined to discuss prices.

Another time, a PCS employee took advantage of a trade meeting to apologize to Kalium's Turner about a low bid PCS had made by mistake. The PCS employee testified that he explained the mistake to Turner because he had "some concern that [the low price] may spread in the marketplace," and that he "was hopeful that it wouldn't go any darn further." Turner testified that Kalium matched the bid, but the reaction was "pretty much confined to that account. It did not go beyond that."

Though PCS made most of these overtures, on isolated occasions others did the same. Kalium's Turner called Ripperger of PCA to complain about a salesman who was cutting prices in Wisconsin. Similarly, Kip Williams of IMC complained to Ripperger about price-cutting in Florida.

Despite evidence that various defendants invited others to join in stabilizing prices, the class was not able to adduce direct evidence that the people on the receiving end of these solicitations accepted them and formed a deal. The evidence of solicitation is relevant, however, because it shows conspiratorial state of mind on the part of the solicitor and may also indicate that the solicitor was acting upon an earlier agreement. See 6 Phillip E. Areeda, Antitrust Law § 1419c (1986) ("Besides serving as direct evidence of a particular agreement, a solicitation might be circumstantial evidence of an ongoing conspiracy. Although no favorable response to the solicitation is shown, the solicitation itself might be the product of a prior agreement.") (footnote omitted).

B.

The stage was clearly set for conspiracy in this case. The question is whether the additional evidence tends to exclude the possibility that the producers acted independently. I believe that it does.

First, the class has produced evidence that the producers cooperated in disclosing prices they had charged on particular

sales. The industry practice was that each producer published a price list stating its price, the dates for which that price would be available, and any discounts that the producer would extend. The price lists were widely distributed to customers and certainly were no secret. However, actual prices sometimes deviated from the lists. When Childers and Doyle came to PCS, a key aspect of their program to raise industry prices was to insist on the list price. Doyle stated in an industry publication: "When I first came on board in the spring of 1987, the first word I put out to our sales force was that the price list was our price, stick to that price and no bending. Anybody who bends was out of here." Despite published price lists with the high follow-the-leader price, the producers continued to undercut each other in privately negotiated deals. (This is what one would expect even from a cartel operating under an illegal agreement, see Hovenkamp, supra at 143.) When word of the discounting got around to PCS, PCS executives, particularly sales chief Doyle, were quite active in contacting the discounter and asking for verification of the rumored price. Significantly, Doyle testified that he never made any such price verification calls before 1987. The number of these verification communications is difficult to pin down, but Doyle estimated he initiated or received three to four calls per year with PCA, five to six per year with IMC, three to four per year with Cominco, five to six total with Kalium, "a few" with NMPC, and one to two total with Noranda. Doyle was by no means the only person making such calls on behalf of PCS, and there is evidence that the other defendants called each other as well (except that there is no evidence of others calling Noranda).

These exchanges were often between high-level executives who were responsible for pricing decisions for their companies or who conveyed the price information to those who did set prices. For instance, Dale Massie, vice president of marketing for Cominco, testified that he had price verification communications with Doyle, head of sales

at PCS. Massie testified that he made up the Cominco price lists, and the evidence shows that Doyle had a key role in determining PCS pricing policy. Charles Hoffman at IMC reported price information from Doyle to his superiors to inform them that "we would have to meet" PCS's price. Similarly, John Ripperger, vice president of PCA, had price verification discussions with Doyle, and Doyle said he had obtained price information from John Huber, Kalium's vice president of sales.

Price verification communications can either violate section 1 directly or they can be evidence of a violation. An agreement to exchange such communications can constitute an unreasonable restraint of trade under the rule of reason if the anticompetitive effect of the agreement outweighs its beneficial effects. See Penne v. Greater Minneapolis Area Board of Realtors, 604 F.2d 1143,1148 (8th Cir. 1979); In re Coordinated Pretrial Proceedings, 906 F.2d at 447 n.13. In price fixing cases, the exchange of sensitive price information can sometimes be circumstantial evidence of the existence of a per se violation. See Penne, 604 F.2d at 1149; In re Coordinated Pretrial Proceedings, 906 F.2d at 447 n.13; In re Plywood Antitrust Litigation, 655 F.2d 627, 633-34 (5th Cir. Unit A 1981); Morton Salt Co. v. United States, 235 F.2d 573, 577 (10th Cir. 1956) (competitors' exchange of price information "is a factor appropriately considered in determining the existence of a conspiracy"). It is this second theory that the class pursues in this case.

Again, acts that would be contrary to the actor's self-interest in the absence of a conspiracy, but which make economic sense as part of a conspiracy, provide the crucial type of "plus factor" evidence necessary to exclude the possibility of independent action. The class contends that "the price verification calls were inconsistent with the 'pricing secrecy' sought by participants in oligopolistic industries because in such industries 'each producer would like to secretly "shade" price[s], thereby gaining sales and avoiding

retaliation.'" The class's argument finds support in the reasoning of United States v. United States Gypsum Co., 438 U.S. 422 (1978), which stated:

> Price concessions by oligopolists generally yield competitive advantages only if secrecy can be maintained; when the terms of the concession are made publicly known, other competitors are likely to follow and any advantage to the initiator is lost in the process. Thus, if one seller offers a price concession for the purpose of winning over one of his competitor's customers, it is unlikely that the same seller will freely inform its competitor of the details of the concession so that it can be promptly matched and diffused.

Id. at 456 (citations omitted). Therefore, if there were no reciprocal agreement to share prices (and the producers certainly do not argue that there was), an individual seller who revealed to his competitors the amount of his privately negotiated discounts would have been shooting himself in the foot. On the other hand, if there were a cartel, it would be crucial for the cartel members to cooperate in telling each other about actual prices charged in order to prevent the sort of widespread discounting that would eventually sink the cartel.

Nor is there any legitimate business purpose which would make it desirable for the producers to reveal their pricing concessions notwithstanding the disadvantage of helping their competitors compete more effectively. These private communications between competitors had no redeeming effect of informing customers of prices, such as the advance announcements of price increases in Reserve Supply Corp. v. Owens-Corning-Fiberlas Corp., 971 F.2d 37, 54 (7th Cir. 1992), or the advertisement of fees in Wallace v. Bank of Bartlett, 55 F.3d 1166,1169 and n.5 (6th Cir.1995).

Cf. Market Force, Inc. v. Wauwatosa Realty Co., 906 F.2d 1167, 1173 (7th Cir. 1990) (defendant broker announced intent to pay reduced commission to buyer's brokers; legitimate business reason was that other brokers needed to know in advance what commissions defendant was willing to pay). See also United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 113-14 (1975) (correspondent bank program legitimate reason for "intimate and continuous cooperation and consultation on interest rates"). To the contrary, the prices stated here were discounts from the published price lists that reflected the prices the producers wanted to charge. The producers had no interest in publicizing these discounts to the market as a whole. Nor is there any evidence of special necessity for horizontal price communications, such as the customer fraud which justified the producers' practices in Cement Manufacturers Protective Ass'n v. United States, 268 U.S. 588, 595-96 (1925). The price communications in this case are more like those in In re Coordinated Pretrial Proceedings, 906 F.2d at 448, which served "little purpose" other than facilitating price coordination.

The Court today concludes that voluntarily revealing secret price-cutting to one's competitors is not probative of conspiracy, for three reasons, each of which is unsound. First, the price verification communications involved completed sales, not future sales. The Court states: "Common sense dictates that a conspiracy to fix a price would involve one company communicating with another company before the price quotation to the customer." Supra at 10. This misconceives the purpose for which the price communications are being offered. The communications are not supposed to be direct evidence of a one-time mini-conspiracy to fix the price on one sale. Rather, they are circumstantial evidence of a type of behavior one would not expect in the absence of an agreement to cooperate. If no cartel was in place, each competitor would seek to benefit from high prices generally, while secretly shading prices

when it would gain a customer without provoking retaliation. Confessing price-cutting when one needn't do so would only invite retaliation and guarantee that one's competitors could match the discounted price exactly next time. This is contrary to self-interest. On the other hand, if the producers were cooperating in a cartel, a necessary feature of their arrangement would be some way to determine who was discounting. Thus, confessing price-cutting to competitors makes no economic sense for independent actors, but makes perfect economic sense for cartel members. The Court has rejected circumstantial evidence of an agreement because it is not direct evidence.

The Court's second reason for dismissing the price verification evidence is that "[t]here is no evidence to support the inference that the verifications had an impact on price increases." Supra at 9. The class points to the price verifications as circumstantial evidence of a broader conspiracy. Parallel price increases are the starting point for the class's case, so that if the conspiracy is proved, effect on prices has been proved at the first step. Compare Court opinion, supra, at 10 ("Parallel pricing has been conceded") with In re Baby Food, 166 F.3d at 128-32 (parallel pricing not established). The Court argues that prices eventually went down, supra at 17, but this glosses over the fact that they first rose dramatically, then remained above both the forecasted price based on market factors and the suspension agreement price until 1992 (with the exception of the two-month dip caused by the PCS "market correction program"). If, to prove collusion, a plaintiff has to prove that there was no cheating, thus no downward pressure on prices, cartels will be quite safe from the Sherman Act. See generally Hovenkamp, supra at 143, § 4.1a "The (Virtual) Universality of Cartel Cheating"; cf. United States v. SKW Metals & Alloys, Inc., 195 F.3d 83, 89-90 (2d Cir. 1999) (in criminal price-fixing case involving widespread cheating by cartel members,

conspiracy can "[affect] prices even when it falls short of achieving the conspirators' target price").

To support its proposition that there is nothing suspicious about oligopolists exchanging non-public price information, the Court relies on In re Baby Food Antitrust Litigation, where the Third Circuit stated: "No evidence . . . shows that any executive of any defendant exchanged price or market information with any other executive." 166 F.3d at 135. The court held that price discussions among low level employees did not show a conspiracy. Id. at 137. This reasoning implies that if high-level executives had been involved, it would have constituted evidence of conspiracy (if, indeed, the plaintiffs had been able to prove parallel pricing, which they did not in In re Baby Food, id. at 128-32). In our case there is a wealth of evidence that high level executives, who were in a position to respond to what they learned, were directly involved in exchanging secret price information. Citing In re Baby Food in a case with this kind of evidence vitiates the distinction on which the Third Circuit relied.

The Court ignores the Third Circuit's articulated rationale in In re Baby Food because the Court thinks the rationale is belied by facts in that case showing that high level executives used information gathered by low-level employees. Supra at 11. The Third Circuit apparently saw a crucial difference between gathering information to use to one's own advantage and giving out information for one's competitors to use to their advantage (and one's own detriment). However gladly the baby food executives used information relayed to them, the facts of In re Baby Food recited by the Third Circuit do not show that the executives were giving away their firms' secrets. The Third Circuit expressly stated that Anderson, a salesman who testified that he gathered information for his superiors, was not instructed to go around giving out advance pricing information about his own company. 166 F.3d at 126 ("Runk [Anderson's superior] never directed him to disseminate Heinz price information to

competitors in the field"). In this case, it is the potash producers' pattern of giving their competitors valuable information that we identify as an act contrary to the producers' self-interest unless there was an agreement. Cf. 7 Up Bottling Co. v. Varni Bros. (In re Citric Acid Litigation) 191 F.3d 1090, 1100 1110 (9th Cir. 1999) (existence of competitor's price list in defendant's files not probative because there is no evidence the competitor gave it to the defendant; defendant's disclosure of secret sales information to trade association was not an act contrary to self-interest because defendant was assured of confidentiality), petition for cert. filed, -- U.S.L.W. -- (U.S. Jan. 19, 2000) (No. 99-1218).

The Court's third reason for dismissing the price verifications is that the verifications were "sporadic." Supra at 10. The evidence indicates that the producers called each other when they had reason to think their competitors were cutting prices, and that they responded to each other's inquiries. The total number of such inquiries is difficult to set, but the defendants characterize it as "no more than several dozen"–surely more than a scintilla. Cf. Container Corp., 393 U.S. at 335 (liability where "all that was present was a request by each defendant of its competitor[s] for information as to the most recent price charged or quoted, whenever it needed such information". . .; "[t]here was to be sure an infrequency and irregularity of price exchanges").

This "sporadic" argument seems to be directed to the quantum of proof, rather than the quality of it. In other words, it is an argument that more proof should exist, rather than an argument that the existing proof is not probative. If the plaintiff adduces evidence of the kind that tends to prove the existence of a conspiracy, I do not believe that Monsanto and Matsushita give a justification for rejecting it. Monsanto and Matsushita lay out a test for the kind of proof necessary in antitrust cases, not the quantity of it. Compare Monsanto, 465 U.S. at 764; and Matsushita, 475 U.S. at 587-88 ("antitrust law limits the range of permissible inferences from

ambiguous evidence"; if claim makes no economic sense, plaintiffs evidence must be "more persuasive" than would otherwise be necessary) with Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254-55 (1986) (where substantive law imposes a heightened standard of proof, as in libel cases, a higher quantum of proof is required to survive summary judgment). Cf. Merck-Medco Managed Care v. Rite Aid Corp., No. 98-2847, 1999 WL 691840, at *8 (4th Cir. Sept. 7, 1999) (unpublished per curiam) (holding that Monsanto-Matsushita inquiry requires higher quantum of probative evidence depending on relative strength of plaintiff and defendant's cases). There is no heightened "clear and convincing" standard of proof in civil antitrust conspiracy cases, requiring a greater quantum of proof than the ordinary "preponderance of the evidence" standard. See In re Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 787-88 (7th Cir. 1999), petition for certiorari filed, 68 U.S.L.W. 3327 (U.S. Nov. 5, 1999) (No 99-786). The plaintiff's evidence must amount to more than a scintilla, but the plaintiff does not have to outweigh the defendant's evidence item by item. See Rossi v. Standard Roofing, Inc., 156 F.3d 452, 466 (3d Cir. 1998).

The Ninth Circuit, in its recent decision of In re Citric Acid Litigation, dismissed evidence of price discussions as "sporadic," but it is not clear whether the court rejected the evidence qualitatively under Monsanto or because it was not quantitatively sufficient to create a material issue of fact. In Citric Acid the existence of a price-fixing conspiracy was conceded, but the question remained whether one defendant, Cargill, had been a party to the conspiracy. See 191 F.3d at 1093. Cargill received summary judgment despite testimony that a competitor had discussions regarding the bidding price of citric acid with someone from Cargill. The Ninth Circuit cited In re Baby Foods and dismissed the evidence as "sporadic price discussions with one individual at Cargill." Id. at 1105. The testimony in question was vague, with no

specific evidence of what was said, and there were other qualitative reasons for rejecting it, including the fact that the timing of the alleged discussions was inconsistent with the plaintiffs theory of the case. See id. at 1104-05. The court also concluded the case by saying that there was no more than a scintilla of evidence that Cargill participated in the conspiracy. See id. at 1106. In re Citric Acid is therefore consistent with the ordinary summary judgment standard in cases requiring a preponderance of evidence, and it does not stand for the proposition that a heightened quantum of proof is necessary to survive summary judgment in antitrust cases.

The Court states in this case that the fact that there were "several dozen communications" among competitors is not "significant." Supra at 10. I would hold that evidence of several dozen communications of the type that tends to prove conspiracy creates a genuine issue of material fact.

In addition to the price verification practices, evidence concerning PCS's "market correction program" in December 1989 also tends to exclude the hypothesis of independent action. On December 18, 1989, PCS cut its prices by $18 a ton for five days. PCS's Carlos Smith stated that the purpose (and effect) of the program was to stabilize prices in the industry:

> Q. [W]as it an attempt to stabilize prices?
>
> A. Yes.
>
> . . .
>
> Q. And did it work?
> A. It leveled them.

A high-level Kalium executive, John Huber, wrote the following notes: "Program was a market correction. Weren't trying to teach other people--only got tired of people who kept chipping away. Program was reasonable one—checked with people.... People started cheating . . . . We wanted to get

their attention. Program to be short, very specific." (Emphasis added.) Huber said he did not recall to whom he had been talking when he made these notes, but the use of the phrase, "We wanted to get their attention," suggests he was taking dictation from someone at PCS.[14]

The wording of Huber's notes implies that the "market correction" program was a way of disciplining producers who had breached an earlier agreement. In plain English, the use of the word "cheating" denotes the breach of an agreement or convention, not independent action. Without an agreement, price cutting would be called "competing," not "cheating."

Moreover, the Huber notes suggest PCS's action was not lonely price leadership, but rather that PCS "checked with people" before cutting prices. Apparently, PCS did not want to risk sparking another price war by letting other producers misunderstand the intent behind the "market correction program." These notes illustrate a situation in which smoke signals were just too ambiguous and dangerous to be trusted, so that competitors had to resort to explicit communications to coordinate prices. See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227-28 (1993) ("anticompetitive minuet" difficult to compose and perform). The notes, taken together with the successful "market correction" program, tend to exclude the possibility of independent action. Cf. Petruzzi's IGA, 998 F.2d at 1233 (predatory pricing that looks like cartel disciplining cheaters is circumstantial evidence of conspiracy).

The class also points to another piece of evidence that tends to exclude the hypothesis of independent action. This is

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[14] Another memorandum in the same time frame prepared by a Noranda employee states: "Casual conversation at the SMA meeting with a fairly senior PCS guy got quite pointed about 'market correction plan' and he was happy to indicate that they could do it again . . . . I don't think the conversation was idle." The similarity of the messages lends additional weight to the inference that PCS was the source of information for the Kalium memo.

the Canpotex memorandum of Friday, January 8, 1988, which stated:

> FYI Canadian potash producers have reached agreement with the United States Department of Commerce and all dumping action has been suspended for a minimum of 5 years. It is rumored that the USD per metric ton increase posted by Canadian producers in 1987 to cover possible tariff payments to the U.S. Govt will be refunded in full or part. In the meantime new price lists are being issued on Monday Jan 11 at: Standard Grade USD 80.00; Coarse Grade USD 84.00; Granular Grade USD 86.00.

(emphasis added). Canpotex is the Canadian producers' cartel organized for sales outside the United States.

Again, the Court misconceives the import of this evidence, rejecting it as direct evidence of an attempt to reach an agreement, when the class offers it as circumstantial evidence of an agreement that already existed. The Court considers it crucial to establish who received the Canpotex memorandum, supra, at 13-14, apparently reasoning that if the memorandum was meant to negotiate an agreement, only people who got the memorandum could respond to it. Instead, the class offers this memorandum as circumstantial evidence tending to show that Canpotex knew on Friday, January 8, of an existing agreement to raise prices. The prophecy by Canpotex that its members would issue new "price lists" with particular prices does indeed tend to show the price increase was coordinated, because otherwise it would have been impossible to know in advance what the individual producers would do.

In sum, the class has adduced evidence of a market structure ripe for collusion, a sudden change from price war to supra-competitive pricing, price-fixing overtures from one

competitor to another, voluntary disclosure of secret price concessions, an explicitly discussed cheater punishment program, and advance knowledge of other producers' price moves. Taken together, this list of "plus factors" adds up to evidence that satisfies the Monsanto standard.

II.

As I understand our previous cases, it is still necessary to take into account the producers' explanation of their conduct in order to ascertain whether their theory deprives the plaintiffs' case of its probative value. See Corner Pocket of Sioux Falls, Inc. v. Video Lottery Tech., Inc., 123 F.3d 1107, 1112 (8th Cir. 1997), cert. denied, 522 U.S. 1117 (1998); Lovett v. General Motors Corp., 998 F.2d 575, 580-81 (8th Cir. 1993). In this case, the producers' theory is that the price rises are explained entirely by the suspension agreement and the spectre of Saskatchewan prorationing legislation. In light of the evidence adduced by Professor Rausser and the Commerce Department correspondence indicating that the industry price far exceeded the price floors set by the suspension agreement, I cannot see that the producers' explanation deflates the class's price-fixing theory. I fully understand that the producers dispute Rausser's understanding of the suspension agreement price levels. Moreover, there is absolutely no dispute that prices had to rise above the price-war levels to comply with the suspension agreement. However, the producers make no attempt to identify a price floor required by the suspension agreement or to show that the producers actually set their prices, for instance the January 11 price of $86.00 for granular grade, by reference to the suspension agreement floor. Indeed, their expert William Barringer argued that it was actually impossible to ascertain whether a given price would satisfy the agreement. Instead, the producers' expert Andrew Rosenfield opined that the defendants needed only to set their

prices "well above" suspension agreement floor prices. Under these experts' testimony, the suspension agreement did not dictate the actual prices charged; therefore, the existence of the suspension agreement does not explain away the facts supporting the class's theory that the actual prices were set by illegal collusion.

Not only were the January 1988 prices higher than the prices required by the suspension agreement, but there is evidence tending to prove that the producers felt free to dip below the suspension agreement prices when it served their purposes. Professor Rausser's price chart shows that during PCS's "market correction" program in January and February 1990, prices dipped below the suspension agreement floor. Deliberately taking prices below the suspension agreement floor to punish price-cutters is not a convincing sign of industry devotion to the suspension agreement, and the fact that it happened discredits the producers' argument that their prices were compelled by the suspension agreement.

The producers have not made a showing that the governmental intervention so explains their actual behavior as to take away the probative power of the class's case. This case should therefore proceed to trial. Accordingly, I dissent.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Amended Order Filed 07-20-99

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-1330

Blomkest Fertilizer, Inc.; Cobden Grain & Feed, on behalf of themselves and all others similarly situated;	*	
Plaintiffs	*	
Hahnaman Albrecht, Inc.; John Peterson, doing business as Almelund Feed & Grain; Laing-Gro Fertilizers, Inc.;	*	
Plaintiffs-Appellants	*	
Clearbrook Ag Service, Inc., on behalf of itself and all others similarly situated; Reamford Liquid Fertilizer, Inc., on behalf of itself and all others similarly situated; Tolley's, Inc., on behalf of itself and all others similarly situated;	*	Appeal from the United States District Court for the District of Minnesota.
Plaintiffs	*	
James River Farm Service, Inc., on behalf of itself and all other	*	

similarly situated; *

*

Plaintiffs-Appellants *

*

Angela Coleman, on behalf of herself and all others similarly situated; *

*

Plaintiffs *

*

Ag Network, Inc.; *

*

Plaintiffs-Appellants *

*

Marcelline Farm Supply, Inc., on behalf of itself and all others similarly situated; *

*

Plaintiffs *

*

v. *

*

Potash Corporation of Saskatchewan, Inc.; Potash Corporation of Saskatchewan Sales, Inc.; Potash Company of America, Inc.; IMC Fertilizer Group, Inc.; Kalium Chemicals, Ltd.; Kalium Canada, Ltd.; Noranda Minerals, Inc.; Central Canada Potash Co.; Noranda Sales Corporation, Ltd.; Cominco, Ltd.; Cominco American, Inc.; Eddy Potash, Inc.; New Mexico Potash Corporation; *

	*
Defendants-Appellees	*
	*
Rio Algom, Ltd.;	*
	*
Defendant	*
	*
PPG Canada, Limited; PPG Industries, Inc.; IMC Global,	*
	*
Defendants-Appellees.	*
	*

Appellees' petition for rehearing has been considered by the court en banc and is granted. The opinion and judgment of the court entered on May 7, 1999, are vacated.

The case is set for oral argument before the court en banc at St. Louis, Missouri, September 13, 1999, at 10:00 a.m. Each party is allotted twenty (20) minutes argument per side. (5369-010199)

July 16, 1999

Order Entered at the Direction of the Court

/s/

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

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*
Defendants-Appellees *

Rio Algom, Ltd.;	*
	*
Defendant	*
	*
PPG Canada, Limited; PPG Industries, Inc.; IMC Global,	*
	*
Defendants-Appellees.	*
	*

On the court's own motion, petition for rehearing by the court en banc is granted. The opinion and judgment of the court entered on May 7, 1999, are vacated.

The case is set for oral argument before the court en banc at St. Louis, Missouri, September 13, 1999, at 10:00 a.m. Each party is allotted twenty (20) minutes argument per side. (5369-010199)

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Hahnaman Albrecht, Inc.; John Peterson, doing business as Almelund Feed & Grain; Laing-Gro Fertilizers, Inc.;	*	
Plaintiffs-Appellants	*	
Clearbrook Ag Service, Inc., on behalf of itself and all others similarly situated; Reamford Liquid Fertilizer, Inc., on behalf of itself and all others similarly situated; Tolley's, Inc., on behalf of itself and all others similarly situated;	*	Appeal from the United States District Court for the District of Minnesota.
Plaintiffs	*	
James River Farm Service, Inc., on behalf of itself and all other similarly situated;	*	

Plaintiffs-Appellants *
*
Angela Coleman, on behalf of herself and all others similarly situated; *
*
Plaintiffs *
*
Ag Network, Inc.; *
*
Plaintiffs-Appellants *
*
Marcelline Farm Supply, Inc., on behalf of itself and all others similarly situated, *
*
Plaintiffs *
*
v. *
*
Potash Corporation of Saskatchewan, Inc.; Potash Corporation of Saskatchewan Sales, Inc.; Potash Company of America, Inc.; IMC Fertilizer Group, Inc.; Kalium Chemicals, Ltd.; Kalium Canada, Ltd.; Noranda Minerals, Inc.; Central Canada Potash Co.; Noranda Sales Corporation, Ltd.; Cominco, Ltd.; Cominco American, Inc.; Eddy Potash, Inc.; New Mexico Potash Corporation; *
*
Defendants-Appellees *

Rio Algom, Ltd.;	*
	*
Defendant	*
	*
PPG Canada, Limited; PPG Industries, Inc.; IMC Global,	*
	*
Defendants-Appellees.	*
	*

Submitted: November 17, 1997
Filed: May 7, 1999

Before BEAM, HEANEY, and JOHN R. GIBSON, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

A certified class of potash buyers appeals the district court's entry of judgment in favor of the defendant potash producers in this antitrust case. The class claims that the producers conspired to fix potash prices in violation of section one of the Sherman Act, 15 U.S.C. § 1 (1994). The district court adopted a recommendation of the Magistrate Judge concluding that the class had not produced any evidence supporting an inference of conspiracy. Although much of the class's evidence of behavior in the potash industry was consistent with a price-fixing conspiracy, the court held that the facts were equally consistent with legal oligopolistic behavior. Relying on Monsanto Company v. Spray-Rite Service Corp., 465 U.S. 752 (1984), and Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475

U.S. 574 (1986), the court entered summary judgment against the class. In re Potash Antitrust Litigation, 954 F. Supp. 1334 (D. Minn. 1997). The class appeals, arguing that the district court misapplied the standards of Monsanto and Matsushita to change the standard for summary judgment in antitrust cases. We reverse in part and affirm in part.

The potash industry is an oligopoly[1] in which the producers ended a price war and raised prices dramatically. The question is whether the class has shown that the new prices resulted from an agreement among the producers to raise and stabilize prices, rather than from innocent reactions to market conditions, combined with actions of the United States and Canadian governments.

Potash is a mineral which is an essential ingredient in fertilizer. Because potash is an essential ingredient, the demand for potash is "inelastic," meaning that people will continue to buy it even if the price goes up, and they will not buy much more, even if the price goes down. The effect of this inelastic demand is that low prices are bad for the producers because the low price does not result in greater sales, except insofar as one producer can take sales away from other producers. Conversely, producers benefit from high prices, because they can sell about as much potash and keep the extra money.

The market for potash in the United States is dominated by Canadian firms. Their share of sales in the United States rose in the early and mid 1980's. Canadian potash constituted 76.7% of the United States' domestic consumption in 1984, 82.6% in 1985, and 84.3% in 1986. David G. Haglund and Alex von Bredow, U.S. Trade Barriers and Canadian Minerals: Copper, Potash and Uranium 68. Not only did the Canadians have a tremendous share of world potash reserves (the province of Saskatchewan alone had nearly fifty percent of world reserves), but the Canadians also enjoyed the

[1] An oligopoly is a market in which there are few sellers.

advantage of being closer to prime United States agricultural areas than were the U.S. domestic producers, who were concentrated in the Southwest.

The principal Canadian potash producers are defendants in this case: Potash Corporation of Saskatchewan Incorporated (PCS);[2] Potash Corporation of America (PCA); IMC Fertilizer Group, Inc.; Kalium[3]; Noranda Minerals, Inc.[4]; and Cominco.[5] These Canadian firms are allied in Canpotex, a cartel that exists to sell potash outside the United States. (In addition to these Canadian firms, two affiliated American companies, New Mexico Potash Corporation and Eddy Potash, are also named as defendants.)

The biggest of these Canadian firms, PCS, was originally owned by the province of Saskatchewan and was run as a governmental company for the avowed purposes of providing jobs and promoting the local Saskatchewan economy. Unfortunately for the potash industry, due to a slump in agriculture, potash demand fell tremendously in the 1980's, resulting in oversupply. The effect of the oversupply was a potash price war, with prices bottoming in 1986 when PCS charged C$45.36 per ton FOB mine.[6] The industry was in

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[2] Including Potash Corporation of Saskatchewan Sales Limited, a subsidiary of PCS.

[3] Including PPG Canada Limited, which operated Kalium as a division; PPG Industries, Inc., parent corporation of PPG Canada; and Kalium Chemicals, Ltd. and Kalium Canada, Ltd.

[4] Including Noranda Minerals, Inc., Noranda Sales Corporation, Ltd., and Central Canada Potash Company Limited, which amalgamated with Noranda Metals Industries Limited under Canadian law.

[5] Including Cominco, Ltd. and its subsidiary Cominco American Incorporated.

[6] Quoting actual prices in this case is quite treacherous because prices are variously given in Canadian and United States dollars, for metric tons and short tons, for different grades of potash, and for potash delivered to different places, often without specifying all these variables.

crisis. PCS alone lost $103 million in 1986. The president of PCS Sales wrote in an internal memorandum that the industry would not be able to end the price war without "joint action":

> It is not possible for a single producer to affect [sic] a turn-around; however, joint action by a group of producers or governments could achieve this.
>
> Given the competitive nature of the business, joint action in North America is not possible except through a vehicle such as Canpotex. Canpotex by itself cannot achieve the objectives unless there is tacit approval and support on the part of other potash exporters. The danger inherent in multilateral decisions by Canpotex (or PCS Sales) is that the world will again see us as a residual supplier.... PCS Sales' past support of price with a view to achieve stability is proof of the fallacy of such attempts.

In fact, Noranda, Kalium, PCA, and PCS had each tried to increase prices unilaterally during 1986, and were forced to rescind the increases when the other producers undercut them.

In 1986, the province of Saskatchewan elected a government which promised to privatize PCS. In preparation for privatizing the company, PCS replaced its management with Charles Childers, CEO, and William Doyle, sales chief, who came to PCS from rival company IMC. Childers was quoted in a trade publication as saying that it was incumbent on PCS "to lead" in order to "straighten out our own company and hopefully give some strength to the potash industry as a whole."

Therefore, we give particular numbers only for purposes of illustration and do not base our legal reasoning or holding on any particular figures.

Also in 1986, two American producers[7] filed a complaint with the United States Department of Commerce alleging that the Canadian companies were dumping potash in the United States at less than fair value (which can mean below prices charged for exports to a third country, below domestic prices in the country where the product is produced, or below a reconstructed cost of production, Haglund and von Bredow, supra, at 65). The Department investigated the claim and in August 1987 issued a preliminary determination that the Canadian producers were dumping potash. The Department ordered the Canadian companies to post bonds on all exports to the United States, which would be payable to the United States as a duty if there were a final determination of dumping and injury to American producers. The amount of the bond varied for each firm according to the firm's "dumping margin," that is, the average amount by which the firm's United States sale price fell below the foreign market value in the cases examined by the Department. The dumping margins varied wildly, from 9.14 percent for IMC up to a crippling 85.2 percent for Noranda.

The Saskatchewan government responded to the United States's action by adopting legislation which would give the province the power to limit and prorate production among Saskatchewan producers. Haglund and von Bredow, supra, at 76. Within days of the introduction of the Saskatchewan legislation, on September 4, 1987, PCS announced that it would increase its prices by $35 per ton (from $58 to $93 per short ton for coarse grade f.o.b. mine), or sixty percent, to account for the bond expense. PCS's dumping margin was set at 51.9 per cent. PCS chose to raise its price only by $35, the amount necessary to pay duties on the industry average dumping margin of 36.62 per cent, rather than by the amount necessary to pay its own duty of 51.9 percent. PCS's choice

[7] One of the American companies was New Mexico Potash Corporation, a defendant in this case. 954 F. Supp. at 1343.

of the industry average figure was, at the least, an attempt to pick a figure that other producers would follow. On September 11, 1987, the other Canadian producer defendants all[8] announced either a $35 price increase or a new price of $93, rather than increasing the price by the amount necessary to cover their individual duty costs.

On January 8, 1988, the Canadian producers reached an agreement with the Department of Commerce, suspending the earlier order. The suspension agreement imposed a minimum price on Canadian producers selling in the United States market, but oddly, the minimum price chosen was still less than the "foreign market value": the Canadians were only forbidden from undercutting "foreign market value" by more than fifteen percent of the producer's dumping margin. Haglund and von Bredow, supra, at 88. The literal terms of the suspension agreement made each producer's minimum price vary with its own foreign market value (which was arrived at by different methodologies for different firms) and with its own dumping margin; as the defendants' expert William Barringer opined, the "uncertainties" in such a calculation make it impossible to predict with accuracy what price for any particular transaction would be in compliance with the agreement. However, correspondence from the Department of Commerce, which had responsibility for monitoring compliance with the suspension agreement, indicates that the Department used an industry average figure in assessing compliance.

As soon as the suspension agreement was in place, PCS again led the way in determining industry pricing, announcing it would rebate the earlier $35 surcharge, and on January 11, 1988, publishing its new price list at $86 per ton for granular grade, an $18 increase. The other Canadian producers

[8] The PCA price list is dated September 16, 1987, but a September 11 memo to the file by Vice President John Ripperger refers to the price increase as having already taken place.

matched PCS's increase within 11 days, and Kalium raised its price to $87. 954 F. Supp. at 1366. The Department of Commerce, in monitoring compliance with the agreement, noted that the agreement imposed an average floor price of $60.67, and that in the five months following the agreement the average price charged was $79.28.

The class's expert, Prof. Gordon Rausser, opined and presented data purporting to show that the industry average prices for potash were higher than would be expected based on market factors during the 1988-1993 period (i.e., prices were "supracompetitive"). Perhaps more to the point, prices remained significantly higher than the minimum prices imposed by the suspension agreement from 1988 to 1993,[9] with the exception of a short period in 1990 when PCS cut its prices drastically for the avowed purpose of stabilizing prices within the industry. Only in the wake of this January 1990 "market correction," did prices briefly dip below the suspension agreement price floor.

The plaintiffs filed suit against the Canadian producers and two affiliated American producers, New Mexico Potash Corp. and Eddy Potash, alleging a conspiracy to raise and stabilize prices. Their proof of the conspiracy was circumstantial, consisting of the economic evidence of supracompetitive pricing and evidence of price discussions among competitors.

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[9] The dissent argues that Rausser does not take into account the effect of the antidumping proceedings, and his testimony is thus irrelevant. Infra at 43. The only aspect of Rausser's evidence on which we have relied is his evidence about forecasted and actual price levels. His price level evidence specifically includes the prices that he contends would be required under the antidumping suspension agreement; therefore, he obviously does take into account the effect of the antidumping proceedings. The dissent's attack on Rausser's conclusion that a conspiracy existed is irrelevant to our decision; we do not rely on Rausser's opinion on this ultimate question, but have necessarily undertaken our own analysis of whether the evidence sufficed to make a prima facie case of conspiracy.

The defendants moved for summary judgment on the ground that the class had not produced any evidence that showed that the defendants had conspired, rather than setting their prices individually taking into account their competitors' probable responses. The motion was referred to a magistrate judge. The class's strongest evidence that the supracompetitive prices resulted from conspiracy was the evidence of price-verification communications among competitors and complaints and threats among competitors about discounting. The magistrate judge rejected each of these types of evidence on the ground that they did not exclude the possibility of independent action. In re Potash Antitrust Litigation, 954 F. Supp. 1334 (D. Minn. 1997). The magistrate judge concluded that the price-verification practices were irrelevant because they were sporadic and concerned completed sales. Id. at 1378. The magistrate judge similarly disregarded the evidence of competitors complaining and threatening each other, because the evidence did not exclude the possibility that the competitors on the receiving end of these communications could have ignored the threats and complaints and acted independently. E.g., id. at 1375, 1384. The district court adopted the magistrate judge's recommendations and entered summary judgment for the defendants. Id. at 1339.

On appeal, the class argues that the district court misapprehended the summary judgment standard, requiring the plaintiffs to establish their case beyond a reasonable doubt to avoid summary judgment.

I.

The standard for summary judgment in antitrust cases is, of course, the same as for summary judgment generally: "[T]he evidence of [the nonmovant] is to be believed, and all justifiable inferences are to be drawn in [its] favor." Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451,

456 (1992) (emphasis added) (quotation omitted); Bathke v. Casey's General Stores, Inc., 64 F.3d 340, 342-43 (8th Cir. 1995) ("We must review the record in the light most favorable to the non-moving party . . . ."). However, substantive requirements of the antitrust laws "limit the range of permissible inferences from ambiguous evidence in a [Sherman Act] § 1 case." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986). Specifically, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Id.

Often in conspiracy cases, the only difference between legal and illegal conduct is the existence of an agreement to do the same thing the parties could have done legally without an agreement. Naturally, the parties cannot be relied on to confess that they have entered the forbidden agreement, so conspiracy cases usually must be proved by circumstantial evidence. ES Development, Inc. v. RWM Enterprises, Inc., 939 F.2d 547, 553-54 (8th Cir. 1991) ("[I]t is axiomatic that the typical conspiracy is rarely evidence by explicit agreements, but must almost always be proved by inferences that may be drawn from the behavior of the alleged conspirators.") (quotations omitted), cert. denied, 502 U.S. 1097 (1992). As Justice Powell observed in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984), a case involving vertical[10] conspiracy to set prices, "[T]he economic effect of . . . unilateral and concerted vertical price setting . . . is in many, but not all, cases similar or identical. And judged from a distance, the conduct of the parties in the various situations can be indistinguishable." Id. at 762 (citations omitted). Because it is important to punish only the forbidden

[10] A vertical conspiracy involves people operating at different levels of the production and distribution chain, e.g., manufacturers and the wholesalers to whom they sell. A horizontal conspiracy involves competitors operating at the same level of the production and distribution chain, e.g., rival grocery stores.

conduct and to avoid deterring legal economic activity, Matsushita, 475 U.S. at 594, a submissible antitrust conspiracy case must include some evidence that "tends to exclude the possibility of independent action by the [alleged conspirators]." Monsanto, 465 U.S. at 768; Matsushita, 475 U.S. at 574.

In determining whether the evidence tends to exclude independent action, we must take into account the defendants' "legitimate business reasons" for their conduct, The Corner Pocket v. Video Lottery Technologies, Inc., 123 F.3d 1107, 1112 (8th Cir. 1997), cert. denied, __ U.S. __, 118 S. Ct. 1054 (1998). If the plaintiffs' evidence supports the defendant's theory of the case as easily as the plaintiffs', summary judgment for the defendant is proper. See id. at 1109; City of Tuscaloosa v. Harcos Chemicals, Inc., 158 F.3d 548, 569 (11th Cir. 1998). Although we must weigh the defendants' evidence in the balance in evaluating the sufficiency of the plaintiffs' case, Corner Pocket, 123 F.3d at 1112, the plaintiffs' evidence only has to "tend to exclude" innocent explanation--it does not have to exclude it absolutely. See In re Prescription Brand Name Drug Antitrust Lit., 123 F.3d 599, 613 (7th Cir. 1998) (Summary judgment in antitrust case not warranted even if key evidence "susceptible of an innocent interpretation" because record must be viewed in light most favorable to nonmovant), cert. denied, __ U.S. __, 118 S. Ct. 1178 (1998); Apex Oil Co. v. DiMauro, 822 F.2d 246, 253, 257 (2d Cir.) (choice between reasonable inferences left to the fact-finder at trial), cert. denied, 484 U.S. 997 (1987). Monsanto itself held that evidence of a newsletter article should be submitted to a jury where an inference of conspiracy from the article was reasonable, but not inevitable. The Court stated: "The interpretation of these documents and the testimony surrounding them properly was left to the jury." 465 U.S. 766 at n.11. Admittedly, there was other "substantial direct evidence" of conspiracy in Monsanto, id. at 765, but the newsletter issue points out that there is still a role for the

jury in choosing among inferences in section one cases. The plaintiffs' evidence must amount to more than a scintilla, but the plaintiff does not have to outweigh the defendant's evidence item by item. Rossi v. Standard Roofing, Inc., 156 F.3d 452, 466 (3d Cir. 1998). In Monsanto the Court recognized that the defendant's evidence had "force," but concluded that the case was properly submitted to a jury. 465 U.S. 768 at n.14. "Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." Eastman Kodak, 504 U.S. at 468 (emphasis added).

In applying the Monsanto standard, we must view the evidence as a whole, rather than asking whether each item of evidence viewed in isolation meets the standard. In re Workers' Compensation Ins. Antitrust Lit., 867 F.2d 1552, 1563 (8th Cir.), cert. denied, 492 U.S. 920 (1989); City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d at 565 (plaintiffs' expert data and testimony "need not prove the plaintiffs' case by themselves; they must merely constitute one piece of the puzzle"); Apex Oil Co., 822 F.2d at 254-55.

We review the district court's determination de novo. Bathke, 64 F.3d at 343.

II.

The type of case alleged here is a good illustration of the abstract principles stated in Monsanto and Matsushita. In this case, it is undisputed that PCS, the largest firm in a concentrated market (the oligopoly), decided to stop the carnage of price wars by raising and stabilizing prices. The other sellers in the industry followed PCS's lead and all received higher prices for their potash. This, of course, is what any rational oligopolist, not just antitrust villains, would want to do. According to accepted economic theory, one would expect a rational oligopolist to raise his price hoping

the others would follow his lead. The other oligopolists know that if they keep their prices low, the brave price leader will simply cut his prices and the battle will resume. On the other hand, if they raise their prices in turn, they can content themselves with selling less product at a higher price and end up with more money in their pockets. See Clamp-All Corp. v. Cast Iron Soil Pine Institute, 851 F.2d 478, 484-85 (1st Cir. 1988) (Breyer, J.), cert. denied, 488 U.S. 1007 (1989). The loser will be the consumer, who benefits from competition, not peaceful coexistence between suppliers. Even though this phenomenon of "interdependence" or "oligopoly pricing" is in a sense anticompetitive, it is legal, so long as it occurs without an agreement among the oligopolists. Id. As then-Judge Breyer explained:

> Courts have noted that the Sherman Act prohibits agreements, and they have almost uniformly held, at least in the pricing area, that such individual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do not constitute an unlawful agreement under section 1 of the Sherman Act. That is not because such pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy for "interdependent" pricing. How does one order a firm to set its prices without regard to the likely reactions of its competitors?

851 F.2d at 484 (emphases in original).

On the other hand, the law can and does prohibit oligopolists from agreeing to match prices. If the oligopolists agree to coordinate price increases, their actions may look the same as innocent oligopoly pricing from the outside, but they have committed a per se violation of section one of the Sherman Act. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 212-18 (1940). The law forbids nonverbal

agreements in restraint of trade, as well as express ones; otherwise, the law would be emasculated as competitors accomplished the forbidden goal with a wink and a nod. The Supreme Court's classic formulation of the conspiracy requirement comes from American Tobacco Co. v. United States, 328 U. S. 781, 809-10 (1946):

> No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose.... The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words. Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified.

(emphasis added) (citations omitted). Accord Monsanto, 465 U.S. at 768 (Test is whether the evidence "reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.").

Therefore, parallel pricing can result either from legal, almost inevitable behavior in a concentrated market, or from an unlawful agreement in restraint of trade. Although parallel pricing evidence is consistent with illegal conduct, it is equally consistent with lawful conduct, and thus does not tend to exclude the possibility of independent action. Parallel pricing in a concentrated market cannot make a submissible section one case, although it may set the groundwork for such a case. See State of Arizona v. Standard Oil Co. (In re Coordinated Pretrial Proceedings), 906 F.2d 432, 444 (9th

Cir. 1990) ("We recognize that such interdependent pricing may often produce economic consequences that are comparable to those of classic cartels. Nonetheless, proof of such pricing, standing alone, is generally considered insufficient to establish a violation of the Sherman Act."), cert. denied, 500 U.S. 959 (1991).

Numerous courts have stated that plaintiffs can establish a prima facie case of conspiracy by showing parallel prices together with "plus factors." E.g., Wallace v. Bank of Bartlett, 55 F.3d 1166, 1168 (6th Cir. 1995), cert. denied, 516 U.S. 1047 (1996); Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1232-33 (3d Cir.), cert. denied, 510 U.S. 994 (1993); Apex Oil Co., 822 F.2d at 253-54; Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1456 n.30 (11th Cir. 1991). Some factors mentioned as "plus factors" are actually background facts, which though they may make the existence of a conspiracy more likely, do not suffice to prove a conspiracy. For instance, "motive to conspire", "opportunity to conspire" or "high level of interfirm communications," all make conspiracy possible, but do not tend to exclude the possibility of independent action. Apex Oil, 822 F.2d at 254. On the other hand, acts that would be irrational or contrary to the defendant's economic interest if no conspiracy existed, but which would be rational if the alleged agreement existed, do tend to exclude the possibility of independent action. Re/Max Internat'l, Inc. v. Realty One, Inc., Nos. 96-3362, 96-3469 and 96-3470, 1999 WL 184350 at * 11 (6th Cir. April 6, 1999); Harcros Chemical, 158 F.3d at 572.

III.

In this case, the class pursues a number of plus factor theories, which the district court concluded were inadequate to make a prima facie case. Of the "plus factors" that merely

make conspiracy possible, such as motive and opportunity to conspire, the plaintiffs have adduced abundant evidence.

Moreover, the plaintiffs have introduced a significant amount of evidence of conduct that we can only characterize as solicitations to enter a price fixing agreement. Most, but not all, of the solicitations were by PCS. For instance, PCS freely complained to Kalium about Kalium's failure to adhere to pricing cut-offs. It was the custom in the industry to give lower prices at times of year when there was no immediate need for fertilizer, but to raise prices during high use periods. Kalium published price lists announcing the pricing cut-off pattern, but in fact often shipped at the lower price after the cut-off date when it did not get orders filled before the cut-off date. PCS sales chief Bill Doyle repeatedly upbraided Kalium's Vice President Robert Turner for shipping at the lower price after the cut-off date. Turner responded "something to the effect" that he would run his own business. Another time, Doyle called Turner and advised him that neither PCS, IMC nor Cominco planned to accede to a certain customer's request to delay filling an order–that is, to ship at the old price after the cut-off. Turner answered that Kalium would try to ship by a certain date, which intent it had already published in a letter to its customers. In the same vein, Doyle approached Turner about a certain bid and told Turner that Kalium's action was "wrong." John Ripperger, Vice President of PCA, also testified that Doyle asked him if PCA was going to institute a price increase and not carry over product at the old price; Ripperger interpreted this question to mean that Doyle "would prefer that we don't make sales at the old price." Also, Doyle complained to Ripperger that PCA's pricing was undermining prices in Florida. Ripperger reported a conversation in which Gary Snyder of PCS asked a PCA salesman if he had sold at a certain price, and then said, "We [PCS] will take it [price] down and bury you [PCA] if that's what you want." In 1988, after the sale of Kalium, Charles Childers, the CEO of PCS, called on Jay Proops, one of

Kalium's new owners, armed with a chart showing that PCS was losing market share and that Kalium and other producers were gaining. Childers said Kalium was undercutting the price. Proops did some research and concluded that Childers' chart had incorrect information and that Kalium was not undercutting. Therefore, Proops took no action in response to Childers's visit. In August 1990, Childers telephoned Joseph Sullivan, the other owner of Kalium. Childers told Sullivan that PCS's "price leadership was not working, despite major efforts" and that Childers "wanted to discuss this issue" with Sullivan. Sullivan declined to discuss prices. Another time a PCS employee took advantage of a trade meeting to apologize to Kalium's Turner about a low bid PCS had made by mistake. The PCS employee testified that he explained the mistake to Turner because he had "some concern that it [the low price] may spread in the marketplace," and that he "was hopeful that it wouldn't go any darn further." Turner testified that Kalium matched the bid, but the reaction was "pretty much confined to that account. It did not go beyond that."

Though most of these overtures were initiated by PCS, on isolated occasions others did the same. Robert Turner of Kalium called John Ripperger of PCA to complain about a salesman who was cutting prices in Wisconsin. Similarly, Kip Williams of IMC complained to John Ripperger of PCA about price-cutting in Florida.

The magistrate judge held this solicitation evidence was inadequate to show conspiracy for two reasons. First, the magistrate judge stated that the complaints and inquiries about pricing cut-offs were only complaints and inquiries, not "requests" to stop post-cutoff shipments. 954 F. Supp. at 1376. We reject this reasoning because it is unlikely that these businessmen would waste their time making telephone calls to competitors without any expectation that their calls might have business results. It is reasonable to infer that they hoped for a favorable response from these contacts.

The magistrate judge's second reason for holding that the solicitations did not prove conspiracy is that there was no evidence that the people on the receiving end of those solicitations accepted them and formed a deal. Id. This is an important point. The evidence of solicitation is relevant, because it shows conspiratorial state of mind on the part of the solicitor and may also indicate that the solicitor was acting upon an earlier agreement. 6 Phillip E. Areeda, Antitrust Law § 1419c (1986) ("Besides serving as direct evidence of a particular agreement, a solicitation might be circumstantial evidence of an ongoing conspiracy. Although no favorable response to the solicitation is shown, the solicitation itself might be the product of a prior agreement.") (footnote omitted). But though this evidence sets the scene for conspiracy, it does not tend to exclude the possibility of innocence, since it only definitively shows a guilty intent on the part of the solicitor, rather than a mutual meeting of the minds.[11] Of course, it is possible to accept a solicitation by acting in accord with it, rather than by expressing assent, see Interstate Circuit v. United States, 306 U.S. 208, 226-27 (1939), but the defendants can plausibly contend that their actions would have been the same regardless of the solicitation. Compare Monsanto, 465 U.S. at 763 (complaints together with action consistent with complaint on vertical conspiracy case not sufficient evidence of conspiracy) with Brown v. Pro Football League, 518 U.S. 231, 241 (1996) ("Antitrust law also sometimes permits judges or juries to premise antitrust liability upon little more than uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable."). The class has not shown actions taken in response to the solicitations that are inconsistent with independent action.

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[11] Commentators observe that even an unaccepted solicitation facilitates coordination of prices in an oligopoly, see Areeda, supra, § 1419d, but this is not the class's theory in this case.

Therefore, the crucial question remains whether the plaintiffs have shown any plus factors that do tend to exclude the possibility of independent action. We, like the district court, conclude that many of the class's theories are inadequate to carry the plaintiff's burden under Monsanto,[12] but we believe the evidence of price verification communications among competitors does establish a prima facie case, when combined with the structure of this industry and supracompetitive pricing.

The class has produced evidence that the defendant producers cooperated in disclosing prices they had charged on particular sales. The industry practice was that each producer published a price list stating its price, the dates for which that price would be available, and any discounts that the producer would extend. The price lists were widely distributed to customers and certainly were no secret. However, actual prices sometimes deviated from the lists. For instance, Steve Hoffman of IMC testified that the percentage of the time that IMC received list price was small. When Childers and Doyle came to PCS, a key aspect of their program to raise industry prices was to insist on the list price. Doyle stated in an industry publication: "When I first came on board in the

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[12] In particular, we conclude that the magistrate judge was correct in holding that many of the alleged actions against self-interest by the defendants were simply one of a number of reasonable actions those defendants could have taken. E.g., 954 F. Supp. at 1363-65, 1368. The law does not permit us to second-guess the defendants' plausible business decisions. Corner Pocket, 123 F.3d at 1112; see Apex Oil, 822 F.2d at 254. The defendants' decisions to enter the suspension agreement instead of trying their luck in a full blown contested proceeding with the Department of Commerce, and the decision of PCS to sell potash to PCA are two examples of decisions that certainly have a rational basis. Even if later armchair quarterbacks disagree with whether they were the most profitable courses of action, reasonable people might make these decisions in the absence of an illegal agreement. Therefore, such actions do not tend to exclude the possibility of innocence. See Willman v. Heartland Hosp. East, 34 F.3d 605, 611 (8th Cir. 1994), cert. denied, 514 U.S. 1018 (1995).

spring of 1987, the first word I put out to our sales force was that the price list was our price, stick to that price and no bending. Anybody who bends was out of here." Despite published price lists with the high follow-the-leader price, the producers continued to undercut each other in privately negotiated deals. When word of the discounting got around to PCS, PCS executives, particularly sales chief William Doyle, were quite active in contacting the discounter and asking for verification of the rumored price. Significantly, Doyle testified that he never made any such price verification calls before 1987.[13] The number of these verification communications was difficult to pin down, but Bill Doyle estimated he initiated or received three to four calls per year with PCA, five to six per year with IMC, three to four per year with Cominco, five to six total with Kalium, "a few" with NMPC, and one to two total with Noranda. Doyle was by no means the only person making such calls on behalf of PCS, and there is evidence that the other defendants called each other as well (except that there is no evidence of others calling Noranda).

These exchanges were often between high level executives who were responsible for pricing decisions for their companies or who conveyed the price information to those who did set prices. For instance, Dale Massie, Vice-president of marketing of Cominco, testified that he had price verification communications with Bill Doyle, head of sales at PCS. Massie testified that he made up the Cominco price lists, and the evidence shows that Doyle had a key role in determining PCS pricing policy. Charles Hoffman at IMC

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[13] There was, however, very sketchy evidence that occasional price verification contacts occurred before the alleged conspiracy dates. Gene Jones, a sales manager at PCS, testified that employees might ask their competitors about a price if they saw each other, but that they were not permitted to telephone each other. He said this could have happened a total of three to five times in 1986 and 1987. This evidence is too skeletal to seriously undermine the class's case.

reported price information from Doyle to his superiors to inform them that "we would have to meet" PCS's price. Similarly, John Ripperger, Vice President of PCA, had price verification discussions with Doyle, and Doyle said he had obtained price information from John Huber, Kalium's Vice President of Sales. The exchange of information between high level executives, who were in a position to respond to what they learned, distinguishes this case from Jacob Blinder & Sons v. Gerber Prods. Co. (In re Baby Food Antitrust Litigation), 166 F.3d 112, 125-26, 135 (3d Cir. 1999), in which the court held that price discussions among low level employees did not show a conspiracy. In Baby Food, the court stated: "No evidence . . . shows that any executive of any defendant exchanged price or market information with any other executive." Id. at 135.[14]

Price verification communications can violate section one in two ways.[15] First, an agreement to exchange such communications can constitute an unreasonable restraint of trade under the rule of reason if the anticompetitive effect of the agreement outweighs its beneficial effects. Penne v. Greater Minneapolis Area Board of Realtors, 604 F.2d 1143,

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[14] The dissent argues at pages 41-42, infra, that the facts of Baby Food show high-level executives collected information gathered by low-level employees. See 166 F.3d at 118-19. There is a crucial difference between gathering information to use to one's own advantage and giving out information for one's competitors to use to their advantage (and one's own detriment). In this case, it is the potash producers' pattern of giving their competitors valuable information which we identify as an act ostensibly contrary to the producers' self-interest. See page 24, infra.

[15] The dissent quotes United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978), in effect for the proposition that exchange of price information among competitors is not per se illegal. Infra at page 41 n.25. This proposition is of course true, and that is why we state above that such communications violate section one only if they fail under the rule of reason or if they are evidence of an agreement to fix or stabilize prices. That said, the fact that such exchanges are not per se illegal clearly dose not mean that they are always permissible.

1148 (8th Cir. 1979); In re Coordinated Pretrial Proceedings, 906 F.2d at 447 n.13. Second, the exchange of such information can be evidence of the existence of an agreement to fix or stabilize prices. See Penne, 604 F.2d at 1149; In re Coordinated Pretrial Proceedings, 906 F.2d at 447 n.13; In re Plywood Antitrust Litigation, 655 F.2d 627, 633-34 (5th Cir. Unit A 1981); Morton Salt Co. v. United States, 235 F.2d 573, 577 (10th Cir. 1956) (competitors' exchange of price information "is a factor appropriately considered in determining the existence of a conspiracy"). It is this second theory that the class pursues in this case.

As we have said, acts that would be contrary to the actor's self interest in the absence of a conspiracy but which can be explained as part of a conspiracy, provide the crucial type of plus factor evidence necessary to exclude the possibility of independent action. The class contends that "the price verification calls were inconsistent with the 'pricing secrecy' sought by participants in oligopolistic industries because in such industries 'each producer would like to secretly "shade" price[s], thereby gaining sales and avoiding retaliation.'" The class's argument finds support in the reasoning of United States v. United States Gypsum Co., 438 U.S. 422 (1978), which stated:

> Price concessions by oligopolists generally yield competitive advantages only if secrecy can be maintained; when the terms of the concession are made publicly known, other competitors are likely to follow and any advantage to the initiator is lost in the process. Thus, if one seller offers a price concession for the purpose of winning over one of his competitor's customers, it is unlikely that the same seller will freely inform its competitor of the details of the concession so that it can be promptly matched and diffused.

438 U.S. at 456 (citations omitted). Gypsum's observation about the expected result of sharing information with competitors about price concessions is borne out by the record in this case. For instance, Steve Hoffman of IMC testified about several cases in which he called competitors (PCS and PCA) to ask whether they had really made the concessions reported by customers. When PCS and PCA confirmed the price cuts, IMC lowered its price to meet them. Similarly, Dean McWilliams of NMPC/Eddy recalled a time when Bill Doyle called him and asked about a particular price. McWilliams said he "probably confirmed the price," and that his company then lost the order, so he believes that Doyle responded to the information by meeting his price.

The magistrate judge cited several reasons in holding that the price confirmation discussions were immaterial. First, the information concerned completed sales, rather than future prices. 954 F. Supp. at 1379. This distinction does not appear determinative in this case because the defendants said they were interested in the completed sales prices because they wanted to know what to charge. For instance, David Benusa of Cominco made verification calls so he could "[m]eet a competitive price if that opportunity was available."

Second, the magistrate judge discounted the price verifications as "sporadic" because they were not coordinated or systematic. 954 F. Supp. at 1379. The evidence indicates that the defendants called each other when they had reason to think their competitors were cutting prices, and that they responded to each other's inquiries. The total number of such inquiries is difficult to set, but the defendants characterize it as "no more than several dozen"--surely more than a scintilla. Cf. United States v. Container Corp., 393 U.S. 333, 335 (1969) (price-fixing agreement where "all that was present was a request by each defendant of its competitors for information as to the most recent price charged or quoted, whenever it needed such information" . . .; "[t]here was to be sure an infrequency and irregularity of price exchanges.")

Moreover, Gypsum specifically observed that sporadic exchanges, as opposed to coordinated exchanges, were inimical to the self-interest of the party giving the information. 438 U.S. at 456.

Third, the magistrate judge said that the evidence indicated the defendants were not always candid with each other, relying on a statement by one deponent that he was "probably" not truthful, and by another that his counterpart at another company had refused to discuss prices with him. 954 F. Supp. at 1379. These two statements cannot cancel out other testimony in which the producers' executives stated that they did furnish the requested information and that they based their prices on information supplied by competitors. Moreover, the two statements are hardly sufficient to support a summary judgment for the defendants. Jerry Jackson of PCS testified that Robert Turner of Kalium refused to discuss prices with him, but Turner himself testified that this took place after this suit was filed in 1993. Testimony about post-lawsuit behavior does not establish conclusively what the defendants' conduct was before the lawsuit. Nor should the case hinge on the testimony of Gary Snyder of PCS, who said that he "probably" was not truthful in responding to price verification inquiries. This statement is uncertain on its face and is not the kind of testimony on which we should resolve a case as a matter of law.

Fourth, the magistrate judge held that there was a legitimate business reason for the price verification inquiries, because the defendant inquiring wanted to know the competitor's selling price. 954 F. Supp. at 1380. This is certainly a business reason for asking for prices, but the question is whether the competitor supplying the information acted contrary to his interest by telling. The Supreme Court in Gypsum refused to carve out a safe harbor for verifying customers' reports of prices. The defendants argued that the need to verify customer reports about prices to claim a "meeting competition" defense under the Robinson-Patman

Act should justify oligopolistic competitors' practice of asking each other about price concessions. The Court concluded that the need to verify customer reports should establish no defense under the Sherman Act. The Court reasoned that if there were no agreement to provide the information reciprocally, the competitor providing information would be acting contrary to his own interest in responding to the request. 438 U.S. at 456. If there were "an agreement, either tacit or express, providing for reciprocity among competitors in the exchange of information" it would likely have the effect of harming competition. Id. at 457. The Court stated:

> Such an agreement would make little economic sense, in our view, if its sole purpose were to guarantee all participants the opportunity to match the secret price concessions of other participants.... For in such circumstances, each seller would know that his price concession could not be kept from his competitors and no seller participating in the information exchange arrangement would, therefore, have any incentive for deviating from the prevailing price level in the industry. Regardless of its putative purpose, the most likely consequence of any such agreement to exchange price information would be the stabilization of industry prices.... [S]uch an agreement would have the effect of eliminating the very price concessions which provide the main element of competition in oligopolistic industries....
>
> Especially in oligopolistic industries such as the gypsum board industry, the exchange of price information among competitors carries with it the added potential for the development of concerted price-fixing arrangements which lie at the core of the Sherman Act's prohibitions.

Id. at 457 (citations omitted).

Thus, in this case, if the price inquiries were unilateral, there would be no good reason to respond, as the competitors did. If the exchanges were pursuant to a reciprocity agreement, in this oligopoly setting, in which prices rose dramatically, the agreement would appear to have been anticompetitive. See Container Corp., 393 U.S. at 340 (Fortas, J. concurring). Action pursuant to such an agreement is not a "legitimate business reason."

Moreover, these private communications between competitors have no purpose of informing customers of prices, such as the advance announcements of price increases in Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37, 54 (7th Cir. 1992), or the advertisement of fees in Wallace v. Bank of Bartlett, 55 F.3d 1166, 1169 and n.5 (6th Cir.1995), cert. denied, 516 U.S. 1047 (1996). Cf. Market Force, Inc. v. Wauwatosa Realty Co., 906 F.2d 1167, 1173 (7th Cir. 1990) (defendant broker announced intent to pay reduced commission to buyer's brokers; legitimate business reason was that other brokers needed to know in advance what commissions defendant was willing to pay). See also United States v. Citizens & Southern Nat. Bank, 422 U.S. 86, 113-14 (1975) (correspondent bank program legitimate reason for "intimate and continuous cooperation and consultation on interest rates"). To the contrary, the prices stated here were discounts from the published price lists that reflected the prices the producers wanted to charge. Nor is there any evidence of special necessity for horizontal price communications, such as the customer fraud which justified the producers' practices in Cement Manufacturers Protective Association v. United States, 268 U.S. 588, 595-96 (1925). The price communications in this case are more like those in In re Coordinated Pretrial Proceedings, 906 F.2d at 448, which served "little purpose" other than facilitating price coordination.

The defendants argue that the evidence shows no anticompetitive effect from the defendants' price verification practices, because the depositions showed that when the producers learned of their competitors' discounts, they matched them, thus lowering their prices, not raising them. Though the short term effect of price exchanges may have been to lower the price for a particular sale, it is an economic truism recognized in Gypsum that, where discounts will be promptly discovered and matched, they are less likely to happen. 438 U.S. at 457. Thus, the long-term effect (and intent) of the pattern of price exchanges could be to stabilize prices, regardless of its short-term effect on one sale. See Container Corp., 393 U.S. at 340 (Fortas, J., concurring) (effect of price exchange was to "'stabilize' prices by joint arrangement--at least to limit price cuts to the minimum necessary to meet competition"). More to the point, the communications in this case occurred in the context of an industry with excess capacity; a sudden end to a price war; the industry giant's publicly avowed ambition to lead the industry to higher prices; large price rises above the floor set by the suspension agreement; and a pattern of competitors threatening and rebuking each other's pricing conduct. To this scene, we add private price verification communications among competitors having no legitimate business purpose. This evidence of conspiracy to fix and stabilize prices, though by no means unassailable, is sufficient to survive summary judgment.

In addition to the price verification practices, some evidence concerning PCS's "market correction program" in December 1989 also tends to exclude the hypothesis of independent action. On December 18, 1989, PCS cut its prices by $18 a ton for five days. A PCS witness stated that the purpose (and effect) of the program was to stabilize prices in the industry.[16] While this program was clearly meant to

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[16] PCS's Carlos Smith testified:

Q. [W]as it an attempt to stabilize prices?

discipline price cutters, such price leadership in itself is not illegal. However, a memo written by a high level Kalium executive, John Huber, gives rise to an inference that the program was in response to an earlier agreement. Huber wrote: "Program was a market correction. Weren't trying to teach other people. Only got tired of people who kept chipping away. Program was reasonable one--checked with people .... People started cheating . . . . We wanted to get their attention. Program to be short, very specific." (emphasis added) Huber said he did not recall who he had been talking to when he made these notes, but the use of the phrase "We wanted to get their attention" suggests he was taking dictation from PCS.[17] The magistrate judge dismissed this memorandum because "it is equally reasonable to read the terms ["cheating"] as referring to a general price deterioration, or to prices that were lower than those allowed under the Suspension Agreement." 954 F. Supp. at 1370. By this reasoning, defendants would be entitled to summary judgment if they could come up with any innocent explanation whatsoever for the evidence, no matter how unlikely. Under Eastman-Kodak it is enough if the plaintiffs inference is reasonable--it does not have to be inevitable. 504 U.S. at 468. In plain English, the use of the word "cheating" implies an agreement or convention, not independent action. Without an agreement, price cutting would be called

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A. Yes

. . .

Q. And did it work?
A. It leveled them.

[17] Another memorandum in the same time frame prepared by a Noranda, employee states: "Casual conversation at the SMA meeting with a fairly senior PCS guy got quite pointed about 'market correction plan' and he was happy to indicate that they could do it again . . . . I don't think the conversation was idle." The similarity of the messages lends additional weight to the inference that PCS was the source of information for the Kalium memo.

"competing" not "cheating." The magistrate judge's alternative suggestion that PCS was concerned about others cheating under the suspension agreement is far-fetched, since, according to Prof. Rausser's chart, the only time the prices dipped below the suspension agreement floor levels was in the aftermath of PCS's market correction program in January and February 1990. Dipping prices below the suspension agreement floor is not a convincing sign of PCS's devotion to the agreement. Under the Eastman Kodak standard, the inference of conspiracy is reasonable and the class is entitled to the benefit of it.

The class also points to another piece of evidence that, though its probative power is not great, does tend to exclude the hypothesis of independent action. This is the Canpotex memorandum of Friday, January 8, 1988, which states:

> FYI Canadian potash producers have reached agreement with the United States Department of Commerce and all dumping action has been suspended for a minimum of 5 years. It is rumored that the USD per metric ton increase posted by Canadian producers in 1987 to cover possible tariff payments to the U.S. Govt will be refunded in full or part. In the meantime new price lists are being issued on Monday Jan 11 at: Standard Grade USD 80.00; Coarse Grade USD 84.00; Granular Grade USD 86.00.

954 F. Supp. at 1366 (emphasis added). Canpotex was the Canadian producers' cartel organized for sales outside the United States. The prophecy by Canpotex that its owners would issue new "price lists" as of Monday, January 11, does indeed tend to show the price increase was coordinated, because otherwise it would have been impossible to know in advance what the individual producers would do. The magistrate judge dismissed this memorandum because of

evidence that PCS had telexed two customers with its price list during the day of January 8. The court inferred that Canpotex could have been referring to the PCS "list," which could have been disclosed by the customers. 954 F. Supp. at 1366. However, the class contends that the record shows those telexes were transmitted after the close of business on Friday, January 8, and therefore are unlikely to have wound their way back to Canpotex in time to form the basis for the Canpotex memorandum. Defendants do not dispute that the telexes were transmitted late on January 8, but they suggest that the Canpotex memorandum can be explained by the hypothesis that someone from PCS could have told a customer of the price increase earlier in the day. They cite no evidence to support this theory. Defendants also argue the plural word "lists" actually meant "PCS's list" and therefore only showed knowledge about one defendants' action. Again, the mere possibility of an innocent explanation for evidence that tends to show conspiracy does not entitle defendants to summary judgment.

IV.

As we understand our previous cases, it is still necessary to take into account the defendants' explanation of their conduct in order to ascertain whether their theory deprives the plaintiffs' case of its probative value. See Corner Pocket, 123 F.3d at 1112; Lovett v. General Motors Corp., 998 F.2d 575, 580-81 (8th Cir. 1993), cert. denied, 510 U.S. 1113 (1994). In this case, the defendants' theory is that the price rises are explained entirely by the suspension agreement and the spectre of Saskatchewan prorationing legislation. In light of the evidence adduced by Prof. Rausser and the Commerce Department correspondence indicating that the industry price far exceeded the price floors set by the suspension agreement, we cannot see that this explanation deflates the class's price fixing theory. We fully understand that the defendants dispute

Rausser's understanding of the suspension agreement price levels. However, defendants make no attempt to identify a price floor required by the suspension agreement or to show that the defendants actually set their price, for instance the January 11 price of $86.00 for granular grade, by reference to the suspension agreement floor. Indeed, their expert William Barringer argues that it was actually impossible to ascertain what price would satisfy the agreement. Instead, the defendants' expert Andrew Rosenfield opined that the defendants needed only to set their prices "well above" suspension agreement floor prices. Under this theory, the suspension agreement did not dictate the actual prices charged; therefore, the existence of the suspension agreement does not preclude the class's theory that the actual price was set by illegal collusion.

We therefore reverse the district court's entry of summary judgment, except as against Noranda, NMPC/Eddy, and PPG, each of which raises convincing individual arguments, which we discuss in section V, infra.

V.

Among the defendants, Noranda presents a special case, since there is no evidence that Noranda participated in supplying price information to other defendants. There is slight evidence linking Noranda generally to the exchange of price information, since PCS's Bill Doyle testified that Noranda personnel called him once or twice to ask about prices. Doyle recalled only one conversation, in which he told the Noranda employee that the price that had been reported to Noranda was inaccurate. However, there is no evidence that Noranda acted against its ostensible interest by giving price information to competitors, as opposed to asking the competitors for information; in the absence of such evidence there is simply not a submissible case against Noranda. We

therefore affirm the district court's entry of summary judgment for Noranda.

Plaintiffs' evidence against NMPC/Eddy also lacks a key ingredient--a showing of parallel pricing. Not being subject to the Department of Commerce dumping action, these two affiliated American defendants did not announce the $35 increase in September 1987. Instead, on September 15, 1987, NMPC announced a two-step increase: a $13.50 immediate increase, which would be followed by a $10 additional increase effective January 1, 1988. According to the class, this put NMPC at the same prices in January that the Canadians posted in January after entering the suspension agreement.

The whole premise of the class's case is parallel pricing. Without parallel pricing, their case collapses. See In re Baby Food Antitrust Litigation, 166 F.3d at 128-32; Krehl v. Baskin Robbins Ice Cream Co., 664 F.2d 1348, 1357 (9th Cir. 1982); Meat Price Investigators Ass'n v. Iowa Beef Processors, Inc. (In re Beef Industry Antitrust Litigation), 907 F.2d 510, 514 (5th Cir. 1990) ("When an antitrust plaintiff relies on circumstantial evidence of conscious parallelism to prove a § 1 claim, he must first demonstrate that the defendant's actions were parallel").

The time gap and the number of important events (such as settlement of the Department of Commerce proceedings) between the Americans' action in September 1987 and the Canadians' post-suspension agreement action in January 1988 defeats any inference that those actions were parallel. The class further argues that after January 1988 the American defendants refrained from competing on price. However, the class's proffered evidentiary support for this argument is quite inadequate. In fact, NMPC increased its market share dramatically during this period. 954 F. Supp. at 1365. The evidence against NMPC/Eddy cannot survive summary judgment.

PPG Industries, Inc. and PPG Canada, Ltd., whom we will refer to jointly as "PPG," argue that the district court entered judgment for it on the alternative ground that its suit was barred by the statute of limitations. PPG points out that the class failed to appeal this ruling, since it did not raise the limitations issue in its opening brief. PPG filed a motion to dismiss this appeal on this same theory, which motion was denied without opinion by another panel. The plaintiffs contend that the magistrate judge did not dispose of the statute of limitations question. However, we conclude that he did reach that issue as to PPG, see 954 F. Supp. at 1390-91, and that the district court's order accepted his recommendation that the suit against PPG was time-barred. At any rate, the plaintiffs' contention of tolling based on fraudulent concealment by PPG has no adequate basis in the record, and PPG is entitled to summary judgment.

We therefore affirm the summary judgment against Noranda, NMPC and Eddy, and PPG, and reverse the judgment of the district court and remand for further proceedings as to all other appellees.

BEAM, Circuit Judge, dissenting.

In this Sherman Act case, the court applies its own brand of market-place justice through the use of a newly minted, but flawed summary judgment standard. In so doing, the court disregards well-established Supreme Court precedent, ignores the well-defined law of this circuit and wrongly applies portions of an inapposite Supreme Court opinion. I dissent.

I. BACKGROUND

This dispute involves the production and sale of potash, a mineral essential to plant growth and therefore used in fertilizer. I will not attempt to restate the exhaustive evidence thoroughly discussed by the magistrate judge, but will merely

summarize the relevant facts and restate specific evidence as reasonably necessary for a rational discussion of the issues.

Both parties, and the court, agree that the North American potash industry is an oligopoly.[18] Prices in an oligopolistic market tend to be higher than those in a purely competitive market, and will fluctuate independently of supply and demand. See Enrico Adriano Raffaelli, Oligopolies and Antitrust Law, 19 Fordham Intl. L. J. 915, 916 (1996). Furthermore, "price uniformity is normal in a market with few sellers and homogeneous products." E.I Du Pont De Nemours & Co. v. Federal Trade Comm'n, 729 F.2d 128, 139 (2d Cir. 1984). This is because all producers in an oligopoly must charge roughly the same price or risk losing market share.

The Canadian province of Saskatchewan is the source of most potash consumed in the United States. The Potash Corporation of Saskatchewan (PCS), founded by the province and a defendant in this litigation, holds thirty-eight percent of the North American potash production capacity. As a governmental enterprise, PCS had no mandate to maximize profits and was not accountable to private owners. Instead, the company was primarily concerned with maintaining employment and generating money for the local economy. Not surprisingly, PCS endured huge losses as it mined potash in quantities that far outstripped global demand. These policies impacted the entire potash industry: during the 1980's, the price of potash fell to an historic low. In 1986, Saskatchewan voters elected a provincial government which had promised to privatize PCS. New management was appointed to PCS after the elections. Thereafter, PCS significantly reduced its output and raised its prices.

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[18] An oligopoly is an "[e]conomic condition where only a few companies sell substantially similar or standardized products." Black's Law Dictionary 1086 (6th ed. 1990).

Also in 1986, New Mexico Potash Corporation (NMPC) and another American potash producer (who is not a named defendant) filed a complaint with the United States Department of Commerce. Frustrated with low potash prices, the petitioners alleged that Canadian producers had been dumping their product in the United States at prices below fair market value. In 1987, the Department issued a preliminary determination that the Canadian producers were dumping potash and ordered the companies to post bonds on all exports to the United States. These bonds were set according to each firm's calculated "dumping margin." Eventually, the Department negotiated a Suspension Agreement with each of the Canadian producers. The agreement raised the price of Canadian potash in the United States by setting a minimum price at which each Canadian producer could sell in this country.[19] This agreement remains in effect today. When the Canadian producers entered into the Suspension Agreement, PCS announced that it was raising its prices by eighteen dollars per ton. Other producers quickly approximated the higher price. The price of potash has remained markedly higher after the Suspension Agreement.

The class alleges that between April 1987 and July 1994 the named defendants[20] (collectively, "the producers")

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[19] Under the agreement, each firm could sell potash in the United States at less than fair market value by an amount equal to 15% of its preliminary dumping margin.

[20] The class named six Canadian potash producers: (1) Potash Corporation of Saskatchewan, Inc. and Potash Corporation of Saskatchewan Sales, Ltd. (collectively "PCS"); (2) Cominco, Ltd. and Cominco American, Inc. (collectively "Cominco"); (3) IMC Global, Inc.; (4) Kalium Chemicals, Ltd., Kalium Canada, Ltd. and its former owner and operator, PPG Industries, Inc. and PPG Canada, Ltd. (collectively "Kalium"); (5) Noranda Mineral, Inc., Noranda Sales Corporation Ltd. and Central Canada Potash Co. (collectively "Noranda"); and (6) Potash Corporation of America, Inc. and its owner Rio Algom, Ltd. (collectively "PCA"). The American potash producers named as defendants are New

colluded to increase and stabilize the price of potash in violation of section 1 of the Sherman Act. The class proceeds under the price fixing theory of conscious parallelism. The producers, in turn, maintain that prices were the product of the interdependent nature of the industry and its reaction to significant external forces. The district court granted the producers' motions for summary judgment and the class appeals.

II. DISCUSSION

The class asserts that if we affirm the district court, we will "stand alone in holding that circumstantial evidence, even if overwhelming, cannot be used to defeat a summary judgment motion in anti-trust cases." We would make no such legal history here, however, because the class's proffered evidence, far from overwhelming, fails to establish the elements of a prima facie case. The court reverses the district court but in the process makes two critical errors: (1) it incorrectly states the standard for summary judgment and (2) it incorrectly applies the standard.

A. Summary Judgment Standard

The Supreme Court in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 & 768 (1984) and Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986), provided the standard used to determine whether the plaintiffs' evidence of a section 1 violation survives a summary judgment motion. We are among the majority of circuits to apply Monsanto and Matsushita broadly in section 1 price fixing cases such as the one before us. See Corner Pocket of Sioux Falls, Inc. v. Video

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Mexico Potash Corporation (NMPC) and its affiliate Eddy Potash Inc. (Eddy).

Lottery Tech., Inc., 123 F.3d 1107, 1109 (8th Cir. 1997), cert. denied, 118 S. Ct. 1054 (1998). In order to withstand summary judgment, plaintiffs must present evidence that "tends to exclude the possibility of independent action" by the defendants. Monsanto, 465 U.S. at 764 & 768. This means that conduct that is "as consistent with permissible [activity] as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Matsushita, 475 U.S. at 588. Applied in this case, the standard requires that from the evidence, if it is as reasonable to infer a price-fixing conspiracy as it is to infer permissible activity, then the plaintiffs' claim, without more, fails on summary judgment.

The court, although reciting the Monsanto and Matsushita rule, disregards this clear standard by repeatedly citing from Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992), a wholly inapposite case. Eastman Kodak was not concerned with the sufficiency of evidence of conspiratorial acts, as we are here, but rather with whether Eastman Kodak possessed market power sufficient to be guilty of "tying."[21] Id. at 455 & 459. Eastman Kodak presented a unique factual situation totally distinct from the evidentiary underpinnings of this litigation.

The misuse of Eastman Kodak, and the damaging impact such misuse had on the court's view of the summary judgment standard is clearly evident. The court, for instance, quotes Eastman Kodak as stating, "'Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.'" Ante at 12 (quoting Eastman Kodak, 504 U.S. at 468). This quotation, of course, is misleading since any reasonable inference must still tend to

[21] A classic tie-in occurs when a seller conditions the sale of product A on purchase of product B. Tying arrangements violate section 1 of the Sherman Act if the seller (Eastman Kodak) has appreciable market power in the tying product and if the arrangement affects a substantial volume of commerce in the tied product. Eastman Kodak, 504 U.S. at 461-62.

exclude the possibility of independent action. Similarly, the court later states "[u]nder Eastman-Kodak it is enough if the plaintiff's inference is reasonable." Ante at 27 (concluding that if the inference of conspiracy is reasonable, the class is entitled to the benefit of it). In view of the court's mistaken approach, it cannot be overemphasized that the Supreme Court has rejected this particular summary judgment test and has clearly heightened the standard—the evidence must, as indicated, tend to exclude the "possibility" of independent action.

Interestingly, the court's discussion draws near the proper standard but then, inexplicably, proceeds with an analysis that leads it far astray. Proper analysis demonstrates that the court has not adhered to the controlling precedent of Monsanto and Matsushita especially as this precedent has been broadly construed by this circuit in Corner Pocket.

B. Applying the Standard

The class's price-fixing claim is based on a theory of conscious parallelism. Conscious parallelism is the process "not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests." Brooke Group Ltd. v Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993). The class and the court point out that the producers' prices were roughly equivalent during the alleged conspiracy, despite differing production costs. They further note that price changes by one producer were quickly met by the others. This establishes only that the producers consciously paralleled each other's prices.

Evidence that a business consciously met the pricing of its competitors does not prove a violation of the antitrust laws. See Theatre Enter., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-41 (1954). Particularly when the

product in question is fungible, as potash is, courts have given parallel pricing little probative weight. See Bendix Corp. v. Balax Inc., 471 F.2d 149, 160 (7th Cir. 1972). Even the court concedes that "parallel pricing [is] almost inevitable" in a market situation such as this. Ante at 14. An agreement is properly inferred from conscious parallelism only when certain "plus factors" exist. See In re Baby Food Antitrust Litigation, 166 F.3d 112, 122 (3d Cir. 1999); see, e.g., Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 884 (8th Cir. 1978) (requiring evidence that defendant acted contrary to self-interest in addition to evidence of conscious parallelism to establish antitrust violation). A plus factor refers to "'the additional facts or factors required to be proved as a prerequisite to finding that parallel [price] action amounts to a conspiracy.'" In re Baby Food, 166 F.3d at 122 (quoting 6 Phillip E. Areeda, Antitrust Law § 1433(e) (1986)).

The plaintiff has the burden to present evidence of consciously paralleled pricing *supplemented with* one or more plus factors. See Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1456 n.30 (11th Cir. 1991). However, even after carrying the initial burden, a court must still conclude, based upon all the evidence before it, that the plaintiffs evidence tends to exclude the possibility of independent action. See Monsanto, 465 U.S. at 764 & 768; Matsushita, 475 U.S. at 588; see also In re Baby Food, 166 F.3d at 122. As noted, the class identified parallel pricing. The class also asserts several possible plus factors. The court rejects all[22] but one,

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[22] The court extensively reviews the class's allegations that motive to conspire, opportunity to conspire, solicitation, a high level of interfirm communications, and certain alleged actions against self-interest constitute plus factors. These are all either completely rejected or given insignificant weight as "background facts, which . . . do not suffice to prove a conspiracy." Ante at 15. For example, the class asserts evidence that the producers acted against their self-interests by participating in the Suspension Agreement. See, e.g., Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1243-45 (3d Cir. 1993) (denying defendants' motion for summary judgment where defendants refrained

concluding that "we believe the evidence of price verification communications among competitors" constitutes a sufficient plus factor. Ante at 18-19.

In my view, the class's price verification evidence is far too ambiguous to constitute a plus factor that supports an inference of conspiracy. Cf. Corner Pocket, 123 F.3d at 1112 (finding a letter to be too ambiguous to help the plaintiffs defeat summary judgment). In any event, considering the evidence as a whole, the price verification evidence does not tend to exclude the possibility of independent action, as required under Monsanto and Matsushita, since other significant events strongly suggest independent action. The fundamental difficulty with the class's argument regarding price verifications is that it assumes a conspiracy first, and then sets out to "prove" it. And the court has apparently adopted this approach. However, a litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly.

The class's evidence shows that possibly several dozen price verifications occurred between employees, including high-level sales employees, of different companies,[23] over at least a seven-year period. These contacts involved the verification of *"prices they had charged on particular sales."* Ante at 19 (emphasis added). The downfall of this circumstantial evidence of an agreement to fix prices is that it bears no relationship to the price increases most in question because it lacks the logical link necessary to infer such a relationship.

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from bidding aggressively on accounts already serviced by other defendants). The court summarily rejected this contention. Ante at 18 n.12. Thus, the information is generally gratuitous and irrelevant.

[23] It is noteworthy that the court cites price communications involving defendant companies that it subsequently finds not to have participated in the alleged conspiracy (Noranda and NMPC/Eddy). See, e.g., Ante at 20 & 29-30.

The class alleges that the price-fixing conspiracy began "at least as early as April, 1987." Complaint at 11. In 1987, the price for potash was at historically low levels, such that producers were losing millions of dollars. Then, a sudden and dramatic increase in price by PCS occurred on September 4, 1987, and approximately a week later the remaining producers followed suit.[24] The class and the court argue that the large and parallel price rises which were nearly simultaneous combine with the price verifications to create an inference sufficient to survive summary judgment.

The problem with this theory is that the price verification evidence only applied to prices already charged on particular sales, not to future broad market prices. The court overlooks a critical causal link in this: there is no evidence to support the inference that the price verifications had an impact on price increases. The only evidence is that prices were possibly cut as a result. "[T]o survive summary judgment, there must be evidence that the exchanges of information had an impact on pricing decisions." In re Baby Food,166 F.3d at 125 (citing Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1357 (9th Cir. 1982)). There is no evidence here that price increases resulted from any price verification or any particular communication of any kind. How can subsequent price verification evidence on particular sales support a conspiracy for the setting of a broad market price on September 4, 1987? It cannot.

Even if we find the price verification evidence relevant, when considered with all the facts, it does not tend to exclude the possibility of independent action. To the contrary, there is strong evidence of independent action. Just before and concurrent with the suspect price increases, the following occurred: the price of potash was at historic lows and the

[24] This price increase was rescinded in the wake of the Suspension Agreement. In its place came a much smaller increase on January 11, 1988 by PCS—three days after the Suspension Agreement created a price floor—which was followed thereafter by the remaining producers.

producers were losing millions; potash companies in the United States complained to the United States Department of Commerce that the Canadian producers were dumping potash at well-below market value; the Department of Commerce made a preliminary determination that the Canadian producers were dumping and required expensive bonds for all imports; the industry leader, the government founded PCS, hired new management and began privatization with the goal of becoming profitable; legislation was passed in the province of Saskatchewan—the source of nearly all U.S. potash—that provides for the setting and prorating of potash production; potash producers reached a Suspension Agreement with the Department of Commerce that sets price floors for potash; and PCS was finally privatized and significantly reduced its output. In the face of these circumstances and with the price leadership of PCS in this oligopolistic industry, it would be ridiculous to think that the remaining companies would not also raise their prices in a parallel fashion. The class's weak circumstantial evidence that the dramatic increases were the result of a price-fixing agreement is not sufficient to survive summary judgment. This leaves only the question whether there is sufficient evidence to support an agreement to stabilize and maintain prices in violation of section 1 of the Sherman Act.

The court's evidence of an agreement to maintain the price of potash at an artificially high level after the initial price increases is again the parallel pricing and price verifications. Parallel pricing is conceded, leaving the burden once again on the price verifications. It is common sense to think that a conspiracy to fix a price involves a company that communicates with another company before the price quotation to the customer. Here, in every instance, we have communications to verify a price on a completed sale. To escape this logical conclusion, the court makes several unconvincing arguments.

The court points to a statement by one witness, that he made verification calls in part to see if he could "[m]eet a competitive price if that opportunity was available." Ante at 22. This sounds strangely like competition since the participants are lowering prices to compete. In response to this argument, the court contends that although in the short-term the prices are lowered, the long-term effect is to maintain artificially high prices.[25] However, the class's own evidence establishes that there was a continual decline in the price for potash over the years in question. Appellants' Appendix at 1422-29.

Further detrimental to the court's theory are its own statements that companies seldom received the listed price for the product and "continued to undercut each other in privately negotiated deals." Ante at 19. I suppose that the court is arguing, without evidence one way or the other, that the slow decline in price was not a fast enough decline. This seems to be getting into the very ambiguous and speculative territory the Supreme Court has sought to avoid in section 1 claims. See Monsanto, 465 U.S. at 762-64; Matsushita, 475 U.S. at 594. The Supreme Court has held that when circumstantial evidence is ambiguous, summary judgment should be granted to the defendants. See Monsanto, 465 U.S. at 763-64.

The price verifications relied upon were also sporadic and testimony suggests that price verifications were not always given. The fact that there were several dozen communications is not so significant considering the

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[25] The Supreme Court has also noted that:

> The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive.

United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978).

communications occurred over at least a seven-year period, a period in which there may have been tens of thousands of transactions. Furthermore, you would expect companies to verify prices considering this is an oligopoly and accounts are very large. These facts further undermine the already speculative assertions of the court. The evidence falls far short of excluding the possibility of independent action.

A recent case that demonstrates the frailty of the court's analysis is In re Baby Food Antitrust Litigation, 166 F.3d 112 (3d Cir. 1999). The defendants, nationally prominent corporations with 98% of the baby food business, were Gerber, H.J. Heinz, and Beech-Nut. The numerous intercompany pricing communications found by the Third Circuit to be insufficient to support a section 1 violation are tersely dismissed by the court as "price discussions among low level employees." Ante at 20. However, the deposition testimony revealed that district sales employees and district sales managers of Heinz, one of the alleged conspirators, "were required to submit competitive activity reports to their superiors concerning baby food sales from information they picked up from competitor sales representatives." In re Baby Food, 166 F.3d at 118-19. This same line of testimony revealed that supervising managers for Heinz informed district managers "on a regular basis before any announcement to the trade as to when Heinz's competitors were going to increase [their] wholesale list prices." Id. at 119. The president of Beech-Nut, another alleged conspirator, "testified that it was [Beech-Nut's] policy for sales representatives to gather *and report* pricing information of [Beech-Nut's] competitors." Id. (emphasis added). Indeed, the In re Baby Food case is replete with evidence that pricing information was systematically obtained and directed to high-level executives of Gerber (including Gerber's vice president of sales), Beech-nut and Heinz, the principal national competitors in the baby food industry. So, for the court to disregard the holding in In re Baby Food because

"'[n]o evidence . . . shows that any executive of any defendant [Gerber, Beech-Nut and Heinz] exchanged price or market information *with any other executive*,'" Ante at 20 (quoting In re Baby Food, 166 F.3d at 135) (emphasis added), is to blithely ignore the fact that a carefully conceived and effective system of price information gathering for the benefit of corporate executives was at all relevant times alive and well in the baby food industry.[26]

Notwithstanding communications that far surpassed any information exchanges established in this case, the Third Circuit correctly applied Matsushita and granted summary judgment to the defendants. In doing so, the Third Circuit aptly noted that "to survive summary judgment [on the basis of exchanged pricing information] there must be evidence that the exchanges of information had an impact on pricing

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[26] 26 In its footnote 14, the court purports to find a difference in price discussions where one purported conspirator gathers information and another purported conspirator gives the information. This difficult to understand argument makes nothing more than a distinction without a difference, especially here where there is clearly no evidence connecting any price discussions with the fixing, increasing or maintaining of a price level. See In re Baby Food, 166 F.3d at 125. The only evidence into the contrary and dramatizes the court's flawed reasoning. When price verifications were made, there was no evidence that the companies increased prices or even held the line on prices. Instead, the court itself depicts producers cutting prices in response to confirmed price cuts by another producer on a particular sale. In one instance, the producer who verified a price was then underbid and lost the order. Ante at 22-23. It is difficult to understand the reasoning that, on this evidence, transforms this from an obviously competitive market to a collusive agreement to fix prices. What the court has done, contrary to its own admonition, is view the price verifications in isolation without considering their actual results or attempting to make a connection with the fixing of prices. See Ante at 12 ("In applying the Monsanto standard, we must view the evidence as a whole, rather than asking whether each item of evidence viewed in isolation meets the standard." (citing In re Workers' Compensation Ins. Antitrust Lit., 867 F.2d 1552, 1563 (8th Cir. 1989); City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 565 (11th Cir. 1998); Apex Oil Co. v. DiMauro, 822 F.2d 246, 254-55 (2d Cir. 1987))).

decisions." In re Baby Food, 166 F.3d at 125 (citing Krehl, 664 F.2d at 1357). As earlier stated, there is absolutely no such evidence in this litigation, only speculation.

Finally, the class argues, in a last ditch effort, that its expert's econometric model provided crucial confirmation that the prevailing potash prices during the alleged conspiracy were above those expected in the absence of collusion. Cf. Id. (rejecting a similar argument). We need not decide whether such evidence, in a proper case, could constitute a plus factor, because the report in this case is not probative of collusion.

The class's expert evidence is lacking in two crucial respects. First, the expert admits that his model fails to take into account the dramatic events surrounding the price increases: namely the privatization of PCS and the anti-dumping proceedings. Second, the expert's report, as the magistrate judge noted, relies almost exclusively on evidence (such as the producers' common membership in trade associations and their publication of price lists to customers) that is not probative of collusion as a matter of law. The expert's model is fundamentally unreliable because of heavy (if not exclusive) reliance on evidence that is not probative of conspiracy, coupled with his failure to consider significant external forces that unquestionably served to raise the price of potash. See Loudermill v. Dow Chem. Co., 863 F.2d 566, 570 (8th Cir. 1988).

III. CONCLUSION

The class has failed to present evidence of collusion sufficient to preclude summary judgment under Monsanto and Matsushita. The producers are therefore entitled to summary judgment. For the foregoing reasons, the decision of the district court should be affirmed. I dissent from the court's holding to the contrary.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re: POTASH ANTITRUST LITIGATION

Civil No. 3-93-197/RHK/RLE
MDL Docket No. 981

This Document Relates to: ALL CASES

ORDER

Before the Court are Plaintiffs' Objections to the September 13, 1996 Report and Recommendation of Magistrate Judge Raymond L. Erickson recommending that:

(1) the Motion of PCA and Rio Algom for Summary Judgment (Docket No. 512) be granted;

(2) Kalium's Motion for Summary Judgment (Docket No. 516) be granted;

(3) Noranda's Motion for Summary Judgment (Docket No. 519) be granted;

(4) Cominco's Motion for Summary Judgment (Docket No. 522) be granted;

(5) the Joint Motion of the Defendants for Summary Judgment (Docket No. 525) be granted;

(6) IMC's Motion for Summary Judgment (Docket No. 527) be granted;

(7) PPG's Motion for Summary Judgment (Docket No. 530) be granted; and

(8) the Motion of New Mexico Potash and Eddy Potash for Summary Judgment (Docket No. 534) be granted.

The Court has made a de novo determination of those portions of the Report and Recommendation to which Objections have been made. In doing so, the Court has reviewed the entire file, the Motions for Summary Judgment and supporting and opposing briefs, the proceedings before Judge Erickson, the Report and Recommendation of Judge Erickson, the Objections with respect thereto, the briefs in support of and in opposition to said Objections, and the oral argument of counsel in the hearing held before the undersigned on December 20, 1996. The Report and Recommendation is thorough and well reasoned. In the Court's view, it correctly analyzes and resolves the issues presented by the Motions for Summary Judgment and the Objections now before the Court. No useful purpose would be served by this Court repeating the analysis here. The Court concurs with the determinations of Magistrate Judge Erickson and will adopt the Report and Recommendation in its entirety.

Accordingly, based upon a de novo review of the Objections and upon all the files, records, and proceedings herein, the Report and Recommendation of Magistrate Judge Erickson dated September 13, 1996 is **ACCEPTED** and **ADOPTED**, and

IT IS ORDERED that:

(1) the Motion of PCA and Rio Algom for Summary Judgment (Docket No. 512) is **GRANTED;**

(2) Kalium's Motion for Summary Judgment (Docket No. 516) is **GRANTED;**

(3) Noranda's Motion for Summary Judgment (Docket No. 519) is **GRANTED;**

(4) Cominco's Motion for Summary Judgment (Docket No. 522) is **GRANTED;**

(5) the Joint Motion of the Defendants for Summary Judgment (Docket No. 525) is **GRANTED;**

(6) IMC's Motion for Summary Judgment (Docket No. 527) is **GRANTED;**

(7) PPG's Motion for Summary Judgment (Docket No. 530) is **GRANTED;**
and

(8) the Motion of New Mexico Potash and Eddy Potash for Summary Judgment (Docket No. 534) is **GRANTED.**

Pursuant to the foregoing, Plaintiffs' Third Amended and Consolidated Class Action Complaint (Docket No. 249) is **DISMISSED WITH PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 2, 1997.

/s/
RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

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REPORT AND RECOMMENDATION

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In Re Potash Antitrust Litigation — MDL Docket No. 981
Civ. No. 3-93-197

At Duluth, in the District of Minnesota, this 13th day of September, 1996.

I. Introduction

This matter came before the undersigned United States Magistrate Judge pursuant to a special assignment, made in accordance with the provisions of Title 28 U.S.C. §636(b)(1)(A) and (B), upon the Motions of the Defendants for Summary Judgment.[1]

A Hearing on the Motions was conducted on April 18, 1996, at which time the parties appeared by lead and liaison counsel.[2]

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[1] In addition to the filing of a Joint Motion and Memorandum in Support of Summary Judgment, the Defendants -- with the exception of Potash Corporation of Saskatchewan, Inc. and Potash Corporation of Saskatchewan Sales Limited (collectively "PCS") -- filed Supplemental Motions for Summary Judgment, which separately addressed those issues that were unique to each, individual Defendant.

[2] Appearances were as follows: the Plaintiff Class appeared by Joel C. Meredith, Bruce Cohen, Mark Reinhardt, and Harvey Eckart, Esqs.; Richard J. Favretto, Marc Gary, Kerry Lynn Edwards, and Gordon G. Busdicker, Esqs., appeared on behalf of IMC Fertilizer Group, Inc. ("IMC"); Stephen A. Marshall, and Martin P. Michael, Esqs., appeared on behalf of New Mexico Potash Corporation, and Eddy Potash, Inc.

For reasons which follow, we recommend that the Defendants' Motions for Summary Judgment be granted.

II. Factual and Procedural Background

This action was commenced on April 1, 1993, when the first of twelve Complaints was filed in this Court, alleging that the Defendants had violated Section 1 of the Sherman Act, Title 15 U.S.C. §1, by engaging in a conspiracy to fix the sales price of potash, a mineral that is widely used in the manufacture of fertilizers.[3] On May 19, 1993, the District

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(collectively "NMP/Eddy"); David C. Gustman, and Michael Kelly, Esqs., appeared on behalf of Noranda Minerals Inc., Noranda Sales Corporation, Ltd., and Central Canada Potash Company, Limited (collectively "Noranda"); Michael Evan Jaffe, and Gerald Zingone, Esqs., appeared on behalf of PCS; Gerald A. Connell, and Ronald M. Wick, Esqs., appeared on behalf of Cominco, Ltd., and Cominco American Incorporated (collectively "Cominco"); Victor S. Friedman, and Eric Queen, Esqs., appeared on behalf of Potash Company of America, Inc. ("PCA"), and Rio Algom, Limited ("Rio Algom"); Frank A. Taylor, and Kathryn M. Walker, Esqs., appeared on behalf of PPG Canada Limited and PPG Industries, Inc. (collectively "PPG"); Douglas E. Rosenthal, and Amy L. Bess, Esqs., appeared on behalf of Kalium Chemicals, Ltd., and Kalium Canada, Ltd. (collectively "Kalium"); and Leon R. Goodrich, Esq., appeared on behalf of Cominco, Kalium, Noranda, and PCA.

[3] "Potash" is a generic name for a variety of potassium forms. The potassium found in potash, together with nitrogen and phosphorus, constitute the three basic raw materials used in the production of fertilizers. The predominant form of potash is "muriate of potash," which is otherwise known as "potassium chloride." Muriate of potash, which constitutes nearly all of the potash consumed in the United States, is available in three varieties of particle size: standard, coarse, and granular. Plaintiffs' Third Amended and Consolidated Class Action Complaint ("Third Amended Complaint") at ¶36. In addition to its employment as a fertilizer, a small portion of potash is consumed in various industrial applications. Potash is typically mined from underground land deposits, either through conventional or through "solution" mining. The potash, that is produced through solution mining, is white in color, whereas the potash, that is mined through conventional means, is typically red. Only white potash is suitable for industrial uses. Expert Report of Andrew W.

Court, the Honorable Richard H. Kyle presiding, directed the parties to file an Amended Consolidated Class Action Complaint which would combine the twelve separate proceedings.[4]

The Plaintiffs' First Amended Consolidated Class Action Complaint was filed on June 4, 1993. Thereafter, the Defendants informed the Court that Keith Barton ("Barton"), who had previously served as the General Counsel to PCS, had furnished counsel for the Plaintiffs with confidential information about PCS, which Barton had acquired as legal counsel to that company. By Order dated December 8, 1993, the District Court concluded that Barton had breached his ethical obligations, by impermissibly disclosing certain of PCS's confidences. As a necessary, remedial sanction, the District Court disqualified the bulk of the counsel, who had then been retained by the Plaintiffs, and whose capacity, to ethically serve in this litigation, had been irreconcilably compromised by their involvement with Barton, and directed the Plaintiffs to file Amended Complaints which would be free from the taint of Barton's disclosures. See, In re Potash Antitrust Litigation, Civ. No. 3-93-197, M.D.L. Docket No. 981, 1993 WL 543013 (D. Minn., December 8, 1993).

In a Third Amended Complaint, which was served and filed on July 8, 1994, the Plaintiffs have alleged that the Defendants conspired, from April of 1987, to and including July 8, 1994, to fix, stabilize, and maintain potash prices, and that, as a result of that conspiracy, price competition in the

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Rosenfield ("Rosenfield Rept.") at ¶59, attached as Exhibit 17, Defendants' Joint Memorandum in Support of Summary Judgment Affidavit of Gordon Busdicker ("Defs.'Jt.Memo.Aff.").

[4] On August 19, 1993, the Judicial Panel on Multidistrict Litigation transferred to this Court, in order that they might be consolidated with the twelve actions that this Court had previously combined, certain proceedings, which had originated in the District Courts for the Northern District of Illinois, and for the Western District of Virginia, and which involved the same or similar issues.

sale of potash, among the Defendants and their co-conspirators, had been restrained. Specifically, the Plaintiffs have asserted that the Defendants, and their co-conspirators, raised, fixed, maintained and stabilized the price of potash throughout the United States, at artificially high and noncompetitive levels, thereby depriving their customers of the benefit of free and open competition. Third Amended Complaint at ¶ 55. The Plaintiffs seek injunctive relief and the recovery of treble damages, together with their costs and attorneys' fees, pursuant to Sections 4 and 16 of the Clayton Act, Title 15 U.S.C. §§15 and 26.

Included within the Plaintiff Class are all of those persons, who directly purchased potash from one of the Defendants, during the period of the alleged conspiracy. Accordingly, by order dated January 12, 1995, the District Court certified the following class of Plaintiffs:

> All purchasers (excluding governmental entities, defendants, subsidiaries and affiliates of defendants, co-conspirators of defendants, and other producers of potash and their subsidiaries and affiliates) in the United States of potash directly from defendants or any subsidiary or affiliate thereof at any time during the period April 1987 to and including July 8, 1994.

In re Potash Antitrust Litigation, 159 F.R.D. 682, 700 (D. Minn. 1995).

By Order dated May 2, 1995, the Court drafted, for distribution, a Notice which was "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." In re Potash Antitrust Litigation, 161 F.R.D. 411, 412 (D. Minn. 1995). Insofar as we are aware, the Court-sanctioned Notice was published, and was mailed, in accordance with our directions, on or about June 30, 1995.

With the exception of PPG and Rio Algom, the Defendants are either Canadian or American producers of potash, or are the marketing subsidiaries of those producers.[5] Although the attributes, which are said to distinguish the Defendants, will be addressed when relevant to our subsequent analysis, a brief discussion of the potash market will provide a helpful backdrop.

PCS, which is the largest producer of potash in North America, was created, in 1975, by the Saskatchewan Government, and was vested with the authority to acquire up to 50 percent of the productive capacity for potash in that Province. In 1989, PCS was privatized -- a process that the Defendants assert was initiated in the latter part of 1986 -- with the result that a change in its merchandising was introduced, from one of production to one of profit. Kalium, which is another Canadian producer of potash, contends that, during the period of the alleged conspiracy, it was able to increase its market share by exploiting the superiority of its

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[5] As to PPG and Rio Algom, their involvement in the sale of potash, in the United States, arises from their ownership of one or more of the co-Defendants. For example, until November of 1987, PPG owned and operated Kalium as a business unit. PPG's Memorandum in Support of Summary Judgment ("PPG Memo.") at 1. On August 20, 1987, PPG agreed to sell its interest in Kalium to S&P Canada, Ltd. and S&P U.S., Inc. (collectively "S&P"), and that transaction was completed on November 17, 1987. Id. at 1 n. 1. Rio Algom, on the other hand, acquired, in 1986, the Potash Company of America, Inc. ("PCA Canada"), which is a Canadian company that operated two Canadian potash mines, and that merchandised potash in the United States. Declaration of John A.H. Bush at ¶2, attached to PCA's and Rio Algom's Memorandum in Support of Summary Judgment ("PCA/Rio Algom Jt.Memo."). PCA Canada operated as a wholly-owned subsidiary of Rio Algom until December 31, 1987, when Rio Algom created a division ("Division") which oversaw the operations of the two mines. Id. at ¶3. On that same date, Rio Algom transferred the responsibility, for the sale and marketing of potash in the United States, to PCA, which operated as a wholly-owned subsidiary of Rio Algom. Id. at ¶4. Thereafter, in October of 1993, PCA's assets, and the potash mining assets of the Division, were sold to PCS. Id. at ¶5.

product -- white potash -- through a patented method of solution mining. Noranda's marketing plan, on the other hand, is somewhat distinguishable, since 80 percent of its sales are consummated with only two customers, whose purchase agreements have required that Noranda sell its potash at the market price. In contrast, PCA's marketing in the United States has been less successful than that of the other Defendants, as is reflected in its dwindling market share, from approximately 8 percent, in 1986, to 1.3 percent, in 1993, see, PCA/Rio Algom Jt. Memo. at p. 6, as well as by its resort to purchasing potash from a co-Defendant, as a result of the loss of its mine, in February of 1987, to flooding. The remaining Canadian producers include Cominco and IMC, while New Mexico Potash ("NMP"), and Eddy Potash, are the only Defendants who are located in the United States.

The Plaintiffs contend that, after PCS increased its potash prices, in April of 1987, the other producers -- acting in concert -- followed suit by increasing their prices. Third Amended Complaint at ¶50. According to the Plaintiffs, this same pattern of pricing continued throughout the remainder of 1987; so that, by the beginning of 1988, price increases for potash had exceeded 74 percent. Id. at ¶51. Since the Third Amended Complaint has principally focused upon this particular period of time, a brief overview of the potash industry, together with a recitation of what appear to have been the key operative events which led up to January of 1988, will provide some additional context for the discussion that follows.

The North American potash industry is, and has been, highly concentrated. For example, in the 1985/1986 fertilizer year,[6] the Defendants comprised over 80 percent of the

[6] The "fertilizer year" runs from July 1 through June 30. Expert Report of Louis A. Guth at ¶9 n. 7 ("The crop year runs from July 1 through June 30."), attached as Exhibit Q, NMP/Eddy Memorandum in Support of Summary Judgment, Affidavit of Steven A. Marshall ("NMP/Eddy Jt.Memo.Aff.").

productive capacity for potash in North America. Expert Report of Gordon C. Rausser ("Rausser Rept.") at ¶ 12, attached as Tab 59, Plaintiffs' Joint Brief in Opposition to Summary Judgment, Affidavit of Harvey H. Eckhart ("Pltfs.'Jt.Opp. Aff."). By the 1993/1994 fertilizer year, the Defendants' productive capacity had increased to over 90 percent. Id.

In addition to the limited number of producers who serve the potash market, it is significant that potash is an essentially homogeneous product, with the result that its purchasers largely consider the output, from different producers, to be interchangeable. Id. at ¶7. Moreover, the demand for potash is inelastic -- that is, a decrease in the price of potash will not necessarily lead to a comparable increase in consumption -- principally because potash is primarily employed in agricultural uses, where it has no effective substitute, and where it is inexpensive in relation to the total cost of crop production. Id. at ¶10.

As a result of the fungibility of potash, the inelasticity of the demand for the product, and the relatively small number of potash producers, the industry operates in an oligopolistic market, which causes the market participants to be "interdependent." Put simply, "[o]ne firm's actions are interdependent with those of another when their utility depends on the other firm's response." VI P. Areeda & H. Hovenkamp, Antitrust Law ¶ 1411, at 70 (1986) (hereafter "VI Areeda"). As a consequence, in an oligopoly, each producer is generally required to account for the conduct of its competitors, when pricing its product, as the oligopolist cannot, unilaterally, maintain a higher price without losing its market share.[7]

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[7] The mechanics at play here, in the context of a concentrated industry, were succinctly recounted by then Circuit Judge, and now Justice Breyer, as follows:

> A firm in a concentrated industry typically has reason to decide (individually) to copy an industry leader. After all, a

As alleged in the Third Amended Complaint, "[b]y the 1980's, the potash industry was faced with a major oversupply situation, coupled with high fixed costs, leading to major losses for the producers." Third Amended Complaint at ¶ 45. This circumstance of oversupply has been attributed, in part, to a miscalculation of the demand for potash, which declined, in the early 1980's, as the acreage under cultivation decreased in the United States, and as a result of a strategy on PCS's part, as a state-owned employer, to increase employment opportunities in Saskatchewan. See, e.g., Haglund & von Bredow, The Politics of Antidumping: The Potash "War" of 1986-1988, in U.S. Trade Barriers and Canadian Minerals: Copper, Potash and Uranium (1990), p. 66, attached as Exhibit 5, Defs.'Jt. Memo.Aff.; PCS 1981 Annual Report (PC 420978), attached as Exhibit 14, Defs.'Jt.Memo.Aff. The decline in the demand for potash, combined with the increase in production to stimulate a "price war." By October of 1986, the real price of potash had fallen to historically low levels. Indeed, the Defendants' expert, Andrew M. Rosenfield ("Rosenfield"), has calculated that, in real price terms, the price of potash, in October of 1986, was 21 percent lower than the previous historical low. Rosenfield

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> higher-than-leader's price might lead a customer to buy elsewhere, while a lower-than-leader's price might simply lead competitors to match the lower price, reducing profits for all. One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry.

Clamp-All Corp. v. Cast Iron Soil Pipe Institute, 851 F.2d 478, 484 (1st Cir. 1988); see also, United States v. FMC Corp., 306 F. Supp. 1106, 1139 (E.D.Pa. 1969) ("[D]ue to the relative inelasticity of demand for the products a lower price will not increase the size of the total market; no producer can successfully sell at a higher price than its competitors; and if a seller attempts to sell at a lower price * * * its competitors will be given the opportunity to meet its lower price, thereby resulting in uniform prices again, but at a lower level, and without any increase in the original seller's net share of the market."), order supplemented, 317 F. Supp. 443 (E.D.Pa. 1970).

Rept. at ¶76, attached as Exhibit 17, Defs.'Jt. Memo.Aff. Notably, on three separate occasions in 1986, Noranda, Kalium, PCA, and PCS attempted to unilaterally increase prices, but they were forced to rescind the increases when the prices went unmatched. Defs.'Jt.Memo. at 5; Pltfs.'Jt.Opp.Memo. at 3 and 45.

The effect of these low price levels, in an oversupplied market, caused record losses at PCS. In March of 1987, the Provincial Government replaced the upper level of management at PCS with a team led by Charles Childers ("Childers") and William Doyle ("Doyle"), both of whom had previously been employed at IMC.[8] Childers served as PCS's president and CEO, while Doyle became the president of PCS's sales subsidiary. In assuming leadership at PCS, Childers sought to make the operations profitable, in part, in order to prepare the company for privatization, which ultimately occurred in November of 1989. To accomplish the goal of profitability, Childers aspired to position PCS as a leader in the industry. See, e.g., "Tough Decisions Return Balance to the Bottom Line," Custom Applicator, Feb. 1989, attached as Exhibit 24, Defs.'Jt.Memo.Aff.

Against this background of falling prices and, contemporaneous with the change in PCS's management, on February 10, 1987, two American potash producers, Lundberg Industries ("Lundberg") and NMP, petitioned the United States Department of Commerce ("DOC") to initiate an antidumping proceeding against the Canadian producers. In order for an antidumping action to proceed, the United States International Trade Commission ("ITC") has to preliminarily establish that there was a "reasonable indication" that an industry in the United States was being

[8] The ensuing portions of this Report are unavoidably rife with the dramatis personae of the potash industry, as it existed during the period of the alleged conspiracy. For ease of reference, we append to this Report a listing of the identities of those persons whose names reoccur in our discussion of the issues. See, Appendix A.

materially injured by reason of imports which are, assertedly, being sold in the United States at less than their fair market value. See, Title 19 U.S.C. §1673b(a). On March 27, 1987, the ITC determined that a "reasonable indication" had been shown that the United States potash industry had suffered a material injury because of imports. Potassium Chloride From Canada, 52 Fed.Reg. 10641 (April 2, 1987), attached as Exhibit 31, Defs.'Jt.Memo.Aff. Thereafter, the investigation returned to the DOC, which preliminarily determined, on August 21, 1987, that imports of potash were being sold in the United States at "less than fair value." Potassium Chloride From Canada: Preliminary Determination of Sales at Less than Fair Value, 52 Fed.Reg. 32151 (August 26, 1987), attached as Exhibit 32, Defs.'Jt.Memo.Aff.

Based upon this preliminary finding, the DOC ordered the Canadian producers to pay cash deposits, on all future exports to the United States, or to post bonds, that would be equal to the amount by which the Canadian producers were determined to be selling below fair market value -- otherwise known as the "dumping margin." Id. at 32154 ("The Customs Service shall require a cash deposit or the posting of a bond equal to the estimated amounts by which the foreign market values of potassium chloride exceed the United States price."). A separate dumping margin was calculated for each producer, based upon fair value comparisons of that producer's sales to the United States, during the period from September 1, 1986, through February 28, 1987. Id. The dumping margins were established, as follows:

IMC	9.14%
Kalium	6.67%
PCs,	51.9%
PCA	77.4%
Noranda	85.2%
All Others	36.6%

Id. In general terms, IMC and Kalium were determined to produce potash at lower costs than Noranda and PCA.

During the course of the antidumping investigation, the Saskatchewan Government was considering the enactment of legislation that would control the production of potash in that Province. Throughout July and August of 1987, Pat Smith ("Smith"), who was the Minister of Energy and Mines in Saskatchewan, met with representatives of the Canadian producers in order to discuss the implications of any such legislation. Declaration of Pat Smith at ¶6, attached as Exhibit 5, Defendants' Joint Reply Memorandum in Support of Summary Judgment, Supplemental Affidavit of John D. French ("Defs.'Jt.Rep.Aff."). On September 1, 1987, less than two weeks after the announcement of the dumping margins, the Saskatchewan Government introduced the Potash Resources Act. The Act, which was approved by the Saskatchewan Parliament on September 18, 1987, allowed for the creation of a Potash Management Board, which would be empowered to set quotas for each Saskatchewan mine, so as to control the quantity of potash that could be produced in the Province.[9] Potash Resources Act, attached as Exhibit 37,

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[9] In years past, the potash industry had been the subject of an antidumping action, and of prorationing legislation. For example, because of production increases, potash prices fell approximately 50 percent in the latter half of the 1960's. In August of 1969, the United States determined that dumping had occurred and, contemporaneously, the Saskatchewan government enacted a prorationing scheme in order to increase the price of potash that was to be sold in the United States. Under this scheme, not only was each producer granted a production quota, but a minimum price was established which, if violated, would threaten a cancellation of the producer's production license. See, e.g., Picketts, Schmitz & Schmitz, Rent Seeking: The Potash Dispute Between Canada and the United States, Amer.J.Ag.Econ. 255, 260 (May 1991), attached as Exhibit 7, Defs.'Jt.Memo.Aff. Nevertheless, this prorationing legislation was eventually overturned, in the Canadian Courts, for the setting of a floor price would, impermissibly, infringe upon trade. Haglund & von Bredow, The Politics of Antidumping: The Potash "War" of 1986-1988, in U.S.

Defs.'Jt.Memo.Aff. Notations of a meeting, that was attended by representatives of the Provincial Government, and by Noranda, reveal that, while the Government viewed itself as a victim of the antidumping action, it was keenly aware that the price of potash was too low and that the supply was too high. Noranda Memorandum dated July 31, 1987 (NOR 406039), attached as Exhibit 42, Defs.'Jt.Memo.Aff.

In response to the preliminary dumping margins, on September 4, 1987, PCS announced a $35 price increase, effective immediately, which resulted in a total price of $93 for a short ton of granular grade potash. Assertedly, PCS arrived at the $35 figure because it reflected the industry's average antidumping margin. Childers Deposition at 80, attached as Exhibit 45, Defs.' Jt.Memo.Aff. According to PCS's Annual Report in 1987, the $35 increase "served the additional purpose of making the U.S. farm sector aware of potential price increases if the preliminary duties were upheld in a final Department of Commerce decision." PCS 1987 Annual Report, attached as Exhibit 43, Defs.' Jt.Memo.Aff. Thereafter, the remaining Defendant producers, as well as several offshore producers, who were not included in the antidumping proceeding, matched the $35 increase.

Following the announcement of the preliminary dumping margins, IMC, Kalium, and Noranda sought downward revisions in their dumping margins, while the United States petitioners, including NMP, requested an upward revision in some of the companies' margins. In addition, PCS commenced a lobbying effort, in order to enlist the support of American farmers, in its effort to persuade the DOC to rescind the margins. On January 8, 1988, just short of the deadline for its announcement of a final determination, the DOC negotiated a Suspension Agreement with each of the Canadian producers. Under the terms of this Agreement, a

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Trade Barriers and Canadian Minerals: Copper, Potash and Uranium (1990), at 78, attached as Exhibit 5, Defs.'Jt. Memo.Aff.

Canadian producer could sell at less than fair value by no more than 15 percent of its previously determined dumping margin.[10] Suspension of Anti-dumping Duty Investigation: Potassium Chloride From Canada, 53 Fed.Reg. 1393, 1394 (January 19, 1988), attached as Exhibit 35, Defs.' Jt.Memo.Aff.

As an additional term of the settlement, each producer had the right to withdraw from the Agreement, and the entire Agreement was to be terminated, and the investigation resumed, if producers, who accounted for 15 percent or more of Canadian potash exports to the United States, elected to opt out. Title 19 C.F.R. §353.18. Although the DOC expected that, absent some "likelihood of injurious effect on exports of potassium chloride from Canada," the Agreement would expire in January of 1993, we are advised that the Agreement remains in effect today. Suspension of Antidumping Duty Investigation: Potassium Chloride From Canada, 53 Fed.Reg. 1393, 1395 (January 19, 1988), attached as Exhibit 35, Defs.' Jt.Memo. Aff.; Defs.' Jt.Memo. at 8.

On the same date that the producers entered into the Suspension Agreement, PCS announced that, on January 11, 1988, it would distribute new price lists, which would reflect an $86 price for granular grade potash, which constituted an

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[10] In pertinent part, the Suspension Agreement provided as follows:

> Each signatory producer/exporter of potassium chloride from Canada, individually, agrees that the price it will charge for each entry of potassium chloride exported to the United States from Canada for consumption in the United States will be such that the any amount by which the estimated foreign market value exceeds the United States price will not exceed 15 percent of the weighted-average amount by which the estimated foreign market value exceeded the United States price for all less-than-fair-value entries by such signatory producer/exporter that were examined during the Department's investigation.

Suspension of Antidumping Duty Investigation: Potassium Chloride From Canada, 53 Fed.Reg. 1393, 1394 (January 19, 1988), attached as Exhibit 35, Defs.'Jt.Memo.Aff.

$18 increase. Telexes dated January 8, 1988 (NOR 416856, MI 59809), attached as Exhibit 11, Defs.'Jt.Rep.Aff. Within the following eleven days, the remaining Canadian producers matched the $86 price, with the exception of Kalium, which announced a price of $87. See, Pltfs.'Jt.Memo. at 10 n. 15. In conjunction with its announcement of a price increase, PCS followed through on its prior promise that it would refund the $35 surcharge if the duties were not, ultimately, imposed. PCS 1987 Annual Report, attached as Exhibit 52, Defs.'Jt.Memo.Aff. The remaining Canadian producers again followed PCS's lead, and refunded, at least in part, the $35 surcharge.

In their Third Amended Complaint, the Plaintiffs allege that the sharp increase in the price of potash, from April of 1987, through January of 1988, was the result of a price fixing conspiracy. The Defendants, in turn, maintain that the price increases were the inevitable product of the antidumping proceeding, the prorationing legislation, and the management change at PCS. In the Defendants' view, the interdependent nature of pricing, within the potash industry, induced the individual firms to price their product at approximately the same levels. Id. at 5.

In opposition to the Motions for Summary Judgment, the Plaintiffs identify a series of actions, by each of the various Defendants, that they claim were contrary to that particular Defendant's economic self-interest -- unless an agreement to fix prices was at play. In support of the asserted price fixing conspiracy, the Plaintiffs have identified various communications, between certain of the Defendants, which the Plaintiffs characterize as both frequent and integral to the conspiracy, and they have highlighted certain purportedly retaliatory actions, that were taken by the Defendants, against ostensible price "cheaters." In addition, the Plaintiffs have offered the report of their expert witness, Gordon Rausser ("Rausser"), which examines the potash industry, and concludes that the structure of that industry is conducive to

the formation of a price fixing conspiracy. Rausser also conducted a review of the Record, that was amassed in the discovery effort, and observed that certain of the Defendants' actions were inconsistent with individually rational, and economically maximizing, behavior. Lastly, Rausser has designed a statistical model, with which he has analyzed the price of potash in the United States and, according to the results of that analysis, he has concluded that the prices that were existent, during the conspiracy, exceeded the prices that had been forecasted in the model, by an average of 35 percent.

Not surprisingly, the Defendants challenge the validity of Rausser's Report. They claim that not only are the conclusions reached by Rausser in error, but that the methods, which he employed to reach those conclusions, have failed to account for other relevant evidence. Further, the Defendants offer the reports of their own economic experts, each of whom supports their contention that the challenged price increases were the natural product, not of a conspiracy, but of a combination of events that were occurring in the potash marketplace.

The Plaintiffs have also alleged that, throughout the period of their assertedly unlawful conduct, the Defendants have attempted to cloak their conspiracy by engaging in acts of fraudulent concealment, including: (1) "secretly and conspiratorially" discussing and agreeing upon the prices to be charged to their customers; and (2) announcing price increases in a "staggered fashion." Third Amended Complaint at ¶57. In addition, the Plaintiffs contend that neither they, nor the members of the Class, had any knowledge that the Defendants were conspiring "[u]ntil shortly before the filing of the Complaint in this action," nor could they have "discovered any of the violations at any time prior to this date by the exercise of due diligence." Id. at ¶56. Based upon these asserted acts of fraudulent concealment, the Plaintiffs contend

that the statute of limitations, which governs this action, should be equitably tolled. Id. at ¶59.

III. Discussion

The core issue before us is whether the Plaintiffs have produced sufficient evidence, in support of the alleged conspiracy, to survive the Defendants' Motions for Summary Judgment. We conclude that they have not.

A. The Defendants' Common Motions for Summary Judgment.

1. Standard of Review. In antitrust cases, as in other civil actions, a Motion for Summary Judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure; Bathke v. Casey's General Stores, 64 F.3d 340, 342 (8th Cir. 1995)("In complex antitrust cases, no different or heightened standard for the grant of summary judgment applies."); In re Travel Agency Com'n Antitrust Litigation, 898 F. Supp. 685, 690 (D. Minn. 1995) (The principle underlying summary judgment "holds for antitrust claims, as it does for other civil theories."). For these purposes, a disputed fact is "material," if it must inevitably be resolved and the resolution will determine the outcome of the case, while a dispute is "genuine," if the evidence is such that a reasonable Jury could return a Verdict for the non-moving party. See, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'").

As Rule 56(e) makes clear, once the moving party presents a properly supported Motion, the burden shifts to the non-moving party to demonstrate the existence of a genuine dispute. In rebutting the showings of the movant, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but * * * must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), Federal Rules of Civil Procedure [emphasis supplied]; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., supra at 586 ("[O]pponent must do more than simply show there is some metaphysical doubt as to the material facts.").

Moreover, a party is entitled to Summary Judgment where its opponent has failed "to establish the existence of an element essential to [its] case, and on which [it] will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In such a case, no genuine issue of material fact will be found to exist because "a complete failure of proof concerning an essential element of [that party's] case necessarily renders all other facts immaterial." Id. at 323. Of course, "[i]n determining whether a material factual dispute exists, the court views the evidence through the prism of the controlling legal standard." Nebraska v. Wyoming, 507 U.S. 584, 590 (1993). Accordingly, the prism, through which we here appraise the propriety of Summary Judgment, is the law of antitrust, as that law has evolved in the unique environs of an oligopolistic market.

In this respect, Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Title 15 U.S.C. §1. The essence of a Section 1 claim is concerted action and, because the law requires an agreement between two or more persons, "[u]nilateral actions of a single entity do not give rise to antitrust liability under section one of the Sherman Act." Willman v. Heartland Hosp. East, 34 F.3d 605, 610 (8th Cir. 1994), cert. denied, --- U.S.

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Thus, "[o]n a claim of concerted price fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763 (1984). "The standard is whether the evidence, direct or circumstantial, 'reasonably tends to prove that the [alleged violator] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" Pumps & Power Co. v. Southern States Industries, 787 F.2d 1252, 1256 (8th Cir. 1986) , quoting Monsanto Co. v. Spray-Rite Serv. Corp., supra at 764. More recently, the Supreme Court has elaborated upon this standard, and has determined that, in order to successfully oppose a Motion for Summary Judgment, the nonmoving party "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., supra at 588.

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[11] Of course, not every agreement that restrains competition will violate the Sherman Act. It is well settled that Section 1 prohibits only those agreements which unreasonably restrain competition. In identifying such offending agreements, the Supreme Court has held that certain kinds of accords are unreasonable per se, such as agreements among competitors to fix prices. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26 n. 49 (1940); Capital Imaging v. Mohawk Valley Medical Assoc., 996 F.2d 537, 54243 (2d Cir. 1993) (listing the types of per se violations that have been recognized by the Supreme Court), cert. denied, 510 U.S. 947 (1993). Here, the Plaintiffs have alleged a horizontal price fixing conspiracy -- that is, one that involves concerted action on only one level in a product's distribution chain -- and, therefore, the only inquiry is whether the agreement existed, since the unreasonableness of such a restraint is presumed. Cf., Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 659 n. 4 (7th Cir. 1987).

As the Plaintiffs have correctly observed, the precepts of antitrust law do not alter the principle that, "[o]n summary judgment[,] the inferences to be drawn from the underlying facts * * * must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., supra at 587-88, quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Nevertheless, where, as here, there is no direct evidence of collusion,[12] "antitrust law limits the range of permissible inferences from ambiguous evidence in a §1 case." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., supra at 588. Specifically, "conduct as consistent with permissible conduct as with [an] illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Id. In such cases, the plaintiff must "present evidence that 'tends to exclude the possibility' that the alleged conspirators acted independently." Id., quoting Monsanto Co. v. Spray-Rite Serv. Corp., supra at 764.

As a consequence, the plausibility of the underlying economic motive limits the range of permissible conclusions that may be drawn from ambiguous evidence. Indeed, "the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a 'genuine issue for trial' exists within the meaning of Rule 56(e)." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., supra at 596. In such an instance, the Record on Summary Judgment must contain

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[12] The Plaintiffs have produced no direct evidence of a price fixing agreement. Otherwise stated, the Plaintiffs have not pointed to a single document, or excerpt of testimony, that, were we to accept the evidence as true, would establish the alleged conspiracy. Indeed, at the Hearing on the Motions, Plaintiffs' counsel conceded that there is "no direct evidence of an agreement per se." Transcript of Summary Judgment Hearing at 137. Rather, the Plaintiffs exclusively rely upon circumstantial evidence in their proof of the alleged conspiracy. Accordingly, our task is to determine whether that circumstantial evidence, and any justifiable inferences that may be drawn therefrom, are sufficient to create genuine issues of material fact that would warrant the submission of their case to a Jury.

further persuasive evidence if it is to support the claim for recovery. While the conspiracy, that was alleged in Matsushita, may have been an implausible one; the Supreme Court rejected the view that ambiguous evidence creates a Jury issue merely because the alleged conspiracy is objectively reasonable. As the Court explained: "We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy." Id. at 597 n. 21.

As the Supreme Court has more recently observed, in Eastman Kodak Co. v Image Technical Services Inc., 504 U.S. 451, 468 (1992), by requiring that the plaintiffs' claims make economic sense, Matsushita did not invent a new requirement in an antitrust context, but merely articulated an established standard -- namely, "that the nonmoving party's inferences be reasonable in order to reach the jury." As a consequence, "[i]f the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted." Id.

In applying these principles, our Court of Appeals, in Lovett v. General Motors Corp., 998 F.2d 575 (8th Cir. 1993), cert. denied, 510 U.S. 1113 (1994), reversed a Jury's Verdict against a defendant car manufacturer, on the plaintiff's claim that the manufacturer had conspired with some of its auto dealers to injure the plaintiff's dealership. The plaintiff had been selling cars at a price which undercut other, neighboring dealerships. After several dealers complained, the defendant limited its sales allotments to the plaintiff. In granting the defendant Judgment as a matter of law, the Court explained that "the district court failed to recognize that [plaintiff's] evidence [was] as consistent with permissible unilateral conduct on [defendant's] part as it [was] with illegal conspiracy, and that Monsanto does not permit a jury to infer the existence of a conspiracy from ambiguous evidence." Id. at 579: see also, Willman v. Heartland Hosp. East, supra at 612 (affirming grant of Summary Judgment to a hospital, and

to members of its medical staff, on a physician's claim that he was denied staff privileges, because the defendants' actions were "as consistent with the lawful purpose of promoting quality patient care as with the unlawful purpose of eliminating potential competitors.").

Of course, participation in a price fixing conspiracy need not be, nor rarely is, shown by direct evidence, for most conspiracies are proved through inferences that are drawn from the behavior of the alleged conspirators. ES Development, Inc. v. RWM Enterprises, Inc., 939 F.2d 547, 553 (8th Cir. 1991) (citations omitted) ("[I]t is axiomatic that the typical conspiracy is rarely evidenced by explicit agreements, but must almost always be proved by inferences that may be drawn from the behavior of the alleged conspirators."), cert. denied, 502 U.S. 1097 (1992). As a consequence, the Court should not compartmentalize the evidence that is proffered by an antitrust plaintiff but, rather, should analyze the plaintiff's showings as a whole so as to determine if, in its integrated entirety, the evidence supports an inference of concerted action. See, e.g., In re Workers' Compensation Ins. Antitrust Lit., 867 F.2d 1552, 1563 (8th Cir. 1989)("piece-meal analysis must be avoided and the overall conduct of the defendants must be weighed."), cert. denied, 492 U.S. 920 (1989).

Nevertheless, as our Court of Appeals has observed, "a fine line separates unlawful concerted action from legitimate business practices." Lovett v. General Motors Corp., supra at 988. Accordingly, "care must be taken to ensure that inferences of unlawful activity drawn from ambiguous evidence do not infringe upon the defendants' freedom." Petruzzi's IGA v Darling-Delaware, 998 F.2d 1224, 1230 (3rd Cir. 1993), cert. denied, 510 U.S. 994 (1993), quoting Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358 (3rd Cir. 1992), cent. denied, 507 U.S. 912 (1993). Indeed, in Monsanto, the Supreme Court expressed concern that independent action may, quite improperly, be viewed as

evidence of a conspiracy. Monsanto Co. v. Spray-Rite Serv. Corp., supra. There, the plaintiff alleged that Monsanto had illegally conspired, with its other distributors, to terminate the plaintiff's distributorships. The Court observed that "[t]o permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would * * * inhibit management's exercise of its independent business judgment." Id. at 764.

Given the clear import of the foregoing authorities, even in the milieu of antitrust law, Summary Judgment is neither an acceptable means of resolving triable issues, nor is it a disfavored procedural shortcut when there are no issues which require the unique proficiencies of a Jury to weigh the evidence and to render credibility determinations. Celotex Corp. v. Catrett, supra at 327; Health Care Equalization Com. v. Iowa Medical Soc., 851 F.2d 1020, 1031 (8th Cir. 1988) (citing Celotex in antitrust case). We are mindful, however, that only concerted action is within the proscriptions of the Sherman Act and, therefore, we have the added responsibility of assuring that any underlying, lawful conduct is not, inadvertently, condemned and penalized. See also, Thompson Everett, Inc. v. National Cable Advertising, L. P., 57 F.3d 1317, 1322 (4th Cir. 1995) ("[B]ecause of the unusual entanglement of legal and factual issues frequently presented in antitrust cases, the task of sorting them out may be particularly well-suited for Rule 56 utilization."); Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 660 n. 4 (7th Cir. 1987) (citation omitted) ("The ultimate determination, after trial, that an antitrust claim is unfounded may come too late to guard against the evils that occur along the way."), cert. denied, 484 U.S. 977 (1987); Lovett v. General Motors Corp., supra at 988 ("[T]he jury's finding of a conspiracy in this case shows why cases based on ambiguous evidence should not be submitted to a jury.").

As Matsushita confirms, whether the underlying, circumstantial evidence is sufficient to support a reasonable

inference of collusion remains a legal question for the Court's resolution. Thus, evidence which permits equally competing inferences, without "tending" to point in one direction, should not be sent to the Jury, for the Court may not invite the fact-finder to speculate on the consummation of an agreement to restrain trade. Of course, if the underlying conduct is sufficient to support such an inference, then "the question of what weight should be assigned to competing permissible inferences is within the province of the fact-finder at trial." Apex Oil Co. v. DiMauro, 822 F.2d 246, 253 (2nd Cir. 1987), cent. denied, 484 U.S. 977 (1987).

One means by which the Courts may ensure that unilateral, nonconspiratorial conduct is not unintentionally punished is to require the plaintiffs to demonstrate something more than mere paralleling or mimicking conduct. See, e.g., Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 541 (1954). Of course, if persons acted in near unison, but independently of one another and without any agreement or mutual understanding amongst them, then there is no conspiratorial showing. In effect, "individual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do not constitute an unlawful agreement under section 1 of the Sherman Act." Clamp-All Corp. v. Cast Iron Soil Pipe Institute, 851 F.2d 478, 484 (1st Cir. 1988), cert. denied, 488 U.S. 1007 (1989), see also, Petruzzi's IGA v. Darling-Delaware, supra at 1232; Reserve Supply v. Owens-Corning Fiberglas, 971 F.2d 37, 51 (7th Cir. 1992); Apex Oil Co. v. DiMauro, supra at 253; Richards v. Neilsen Freight Lines, 810 F.2d 898, 904 (9th Cir. 1987).

History teaches, however, that in an oligopolistic market, interdependent decision making may produce cartel-like results, In re Coordinated Pretrial Proceedings, 906 F.2d 432, 444 (9th Cir. 1990), cert. denied, 500 U.S. 959 (1991), for, in an oligopoly, each firm understands that its own pricing decisions will affect the others in that market, who are likely

to respond, and whose response will affect the profitability of the pricing decision. As Professor Areeda explains:

> When one oligopolist raises its price, each of his rivals must decide whether to follow or not. Continuing the previous price would allow each of the others to increase his sales if the leader persists in charging a higher price. But each knows that the leader is likely to retract an increase that is not followed. Accordingly, each rival asks himself whether he is better off at the lower price when charged by all or at the higher price when charged by all. If the latter, as will often be the case, the leader's price increase is likely to be followed.

VI Areeda, §1410b at 65.

Notwithstanding this potential consequence, the existence of mere parallel pricing, in an oligopoly, is not, standing alone, actionable. See, e.g., Reserve Supply v. Owens-Corning Fiberglas, supra at 50 (quoting E.I. DuPont de Nemours & Co. v. FTC, 729 F.2d 128, 139 (2d Cir. 1984)("It is well-established, however, that '[t]he mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws.") As the First Circuit has observed, in Clamp-All Corp. v. Cast Iron Soil Pipe Institute, supra at 484, allowing oligopolists to mimic each others prices "is not because such pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy for interdependent pricing[;] [h]ow does one order a firm to set its prices without regard to the likely reactions of its competitors?" [Emphasis in original]. See also, United States v. International Harvester Co., 274 U.S. 693, 708-09 (1927) ("[T]he fact that competitors may see it proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does

not establish any suppression of competition or show any sinister domination.").

Therefore, in order to present a Jury question as to the existence of a conspiracy, there must be a parallelism in pricing that is accompanied by competent, additional evidence. But see, Coleman v. Cannon Oil Co., 849 F. Supp. 1458, 1466 (M.D.Ala. 1993) ("There must therefore be parallelism accompanied by substantial additional evidence to support a finding of an agreement necessary to establish a violation of § 1 of the Sherman Act.) [emphasis in original], citing Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., supra at 541. Accordingly, it is now settled antitrust law that only when the plaintiff shows the existence of this additional evidence -- often referred to as the "plus factors" -- does the evidence tend to exclude the possibility that the defendants were actually acting independently. Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1456 n. 30 (11th Cir. 1991) ("[A]n agreement is properly inferred from conscious parallelism only when 'plus factors' exist."); Apex Oil Co. v. DiMauro, supra at 253; Petruzzi's IGA v. Darling-Delaware, supra at 1244 ("courts require plus factors because otherwise the evidence is equally consistent with legal behavior"); In re Coordinated Pretrial Proceedings, supra at 445.[13]

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[13] Although not expressly denominated as "plus factors," our Court of Appeals has required antitrust plaintiffs to proffer evidence, that is additive to conscious parallelism, in order to avert an award of Summary Judgment. In Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 883 (8th Cir. 1978), the Court looked to whether the parallel conduct was "inconsistent with the self-interest of the individual actors." Indeed, in a related context, the Court concluded that a manufacturer's simple refusal to sell to dealers, who would not sell at suggested retail prices, was insufficient to support a finding that there was an illegal combination to fix retail prices. Russell Stover Candies, Inc. v. Federal Trade Commission, 718 F.2d 256, 260 (8th Cir. 1983). Notably, the Court found that there were "no 'plus factors' to take the case beyond Colgate," a Supreme Court decision that had permitted such conduct. Id. at 260, citing United States v. Colgate & Co., 250 U.S. 300 (1919). Accordingly, we

By way of example, consciously paralleling conduct may allow for an inference of an agreement if it is also shown that each conspirator acted against its own self-interest, by engaging in the paralleling behavior. See, e.g., Petruzzi's IGA v. Darling-Delaware, supra at 1242; Reserve Supply v. Owens-Corning Fiberglas, supra at 51; Apex Oil Co. v. DiMauro, supra at 253. Likewise, a high-level of interfirm communications, when viewed in conjunction with paralleling acts, can serve to allow a Jury to reasonably infer a conspiracy. See, e.g., Market Force Inc. v. Wauwatosa Realty Co., 906 F.2d 1167, 1172 (7th Cir. 1990); Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp., 913 F. Supp. 1088, 1117 (N.D.Ill. 1995), vacated on other grounds, pursuant to settlement (September 18, 1995).

Nevertheless, where an examination of the proffered "plus factors" leads to an equally plausible inference that merely interdependent behavior is at hand, then there is no triable issue that would preclude a grant of Summary Judgment, so long as there is no evidence which tends to exclude the possibility that the alleged conspirators acted independently. See, Market Force Inc. v. Wauwatosa Realty Co., supra at 1171; Apex Oil Co. v. DiMauro, supra at 254. This is so, because "[a]mbiguous evidence cannot be sent a jury [as] a court may not invite the factfinder to speculate that an agreement existed." Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp., supra at 1104. In the final analysis, a "[f]ailure on the part of the plaintiff to produce evidence from which a jury could infer reasonably that conduct was conspiratorial, not unilateral, will lead to summary judgment for the defendant." Richards v. Neilsen Freight Lines, supra at 902.

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believe that, if confronted with this issue, our Court of Appeals would adopt the reasoning of those Courts, which have analyzed the sufficiency of an antitrust plaintiff's evidence, that is proffered in opposition to a Motion for Summary Judgment, on "plus factor" grounds.

2. Legal Analysis.

a. Overview. We begin with an explanation of the analytical approach that we have employed; not because it is novel -- for it is not -- but because of the potential for misapprehension.[14]

What follows is an exhaustive and, perhaps, an uncompromisingly tedious,[15] appraisal of the evidentiary showings that the Plaintiffs regard as demonstrating the

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[14] We think that the parameters of the applicable analytical regime were well-stated in Reserve Supply v. Owens-Corning Fiberglas, 971 F.2d 37, 49 (7th Cir. 1992):

> In [ruling on Motions for Summary Judgment on price fixing claims], the court should first examine the plaintiff's evidence of a conspiracy among the defendants. Next it should examine whether the defendants have offered evidence tending to show that the conduct complained of is as compatible with the defendants' legitimate business activities as with illegal conspiracy. If the court concludes that the foregoing analysis leaves the evidence of conspiracy ambiguous, it should then determine whether the plaintiff can point to any evidence that tends to exclude the possibility that the defendants were pursuing their legitimate independent interests.

See also, Petruzzi's IGA v. Darling-Delaware, 998 F.2d 1224, 1231-33 (3rd Cir. 1993), cert. denied, 510 U.S. 994 (1993); Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575, 1583 (11th Cir. 1988); Apex Oil Co. v. DiMauro, 822 F.2d 246, 252-54 (2nd Cir. 1987), cent. denied, 484 U.S. 977 (1987); but see, In re Coordinated Pretrial Proceedings, 906 F.2d 432, 440 (9th Cir. 1990), cert. denied, 500 U.S. 959 (1991).

[15] We have conscientiously attempted to address each of the items of evidence that the parties have drawn to our attention, but we recognize that one scintilla or another will, almost certainly, escape specific comment. We merely note here that we have conducted both a microscopic and a macroscopic review of the evidence and, if a particular document, or depositional reference, has not been specifically discussed, that does not suggest that the evidence has not been closely considered in our view of the evidence as a whole. See, e.g., Big Apple BMW, Inc. v. BMW of North America, 974 F.2d 1358, 1364 (3rd Cir. 1992), cert. denied, 507 U.S. 912 (1993).

existence of triable issues of price fixing. In conducting this review, we recognize that, by superficial appearance, concern could be expressed that we have invaded the proper role of the Jurors in, at least ostensibly, assessing the believability of the Plaintiffs' evidence. We have not. Rather, we have assumed our customary role as a gatekeeper of the evidences assuring that only competent evidence is submitted for the Jury's consideration. In this sense, the function we fulfill is indistinguishable from our conventional assessment of the qualitative worth of proffered evidence.

We accept, without reservation, our incapacity to adjudge, under the rubric of Rule 56, the credibility of the evidence, but we no more render believability judgments in weighing the reliability of an evidentiary submission, than we do, say, in rejecting expert opinion evidence as being unworthy of a Jury's reliance, in excluding testimony as impermissible hearsay, or in barring the admission of matter that was not subject to the witness's personal knowledge. While a Court's ruling on such matters could be framed as a believability assessment, at its core, the ruling is, quintessentially, one of "screening," so as to "ensure" that the "evidence admitted is not only relevant, but reliable." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993); and see, Rule 802, Federal Rules of Evidence;[16] Rule 602, Federal Rules of Evidence,[17] and related Advisory

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[16]The Advisory Committee's Notes, on Article VIII of the Federal Rules of Evidence, expressly recognizes the tension between excluding all hearsay evidence, and admitting that which, for one reason or another, is regarded as sufficiently reliable. In the Committee's words:

> The solution evolved by the common law has been a general rule excluding hearsay but subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness.

See, also, Daubert v. Merrell Dow Pharmaceuticals, Inc., 503 U.S. 579, 590 n. 9 (1993).

Committee Notes, Rules 602 and 802, Federal Rules of Evidence.

Here, the parties agree -- as, indeed, they were obliged to do by the weight of the governing law -- that the examination of a price fixing claim, in the unique environs of an oligopolistic market, requires more of a showing than the mere existence of the spontaneous forces which cause oligopolists to parrot the pricing decisions of a market leader. In the parlance, the price fixing claimant must present "plus factors" -- that is, reliable indicators of unlawful price fixing -- if a genuine issue of material fact is to be presented for a Jury's resolution. After a most painstaking review, we find that the Plaintiffs have failed to offer such a positive showing, since what they have submitted for our review is, quite literally, "nonplus" -- that is, evidence which places us, because of its substantive ambivalence, in a quandary as to what the evidence should, with any reliability, mean.

In expressing these views, we intend no discredit to the Plaintiffs' effort to raise a genuine issue of material fact. We are advised, and we have no reason to believe otherwise, that hundreds of thousands of discovery documents have been culled by the Plaintiffs, with the result that a grouping of perhaps a hundred, or more, have been isolated, at least in the Plaintiffs' view, as favoring an inference of collusion. Given the sheer volume of this submission, as expanded by the Plaintiffs' recitation of pertinent depositional testimony, there is an instinctive, natural inclination to presume that such a

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[17] As explained by the Advisory Committee Notes to Rule 602, Federal Rules of Evidence:

> "* * * [T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact" is a "most persuasive manifestation" of the common law insistence upon "the most reliable sources of information.

Quoting, McCormick §10, p. 19; see also, Daubert v. Merrell Dow Pharmaceuticals, Inc., supra at 590 n. 9.

daunting collection of documents must, a fortiori, generate triable issues of fact. Our review, however, has convincingly persuaded us otherwise.

By way of a brief analogy, quite recently, in Wright v. Willamette Industries, Inc., 91 F.3d 1105 (8th Cir. 1996), our Court of Appeals was obliged to determine whether the plaintiffs had presented a submissible case to a Jury concerning the ill health effects that they attributed to living next to an operation that exposed them to formaldehyde. Although a Jury awarded damages to the plaintiffs, and notwithstanding the Trial Court's denial of the defendants' post-Trial Motions, the Court of Appeals reversed, because the claimants had failed to establish the level of exposure to formaldehyde that was reasonably known to cause adverse health consequences. In the absence of such a causative showing, the Court concluded that the Jury could do no more than speculate on the issue of causation. Id. at 1108. While we grant that the issues we confront here do not have the objectivity of medical science, we are aware of no reason why they should escape the "reasonable inference" standard that the Court employed in Wright.

Where the empirically established principles, which govern the operation of an oligopolistic market, and which reliably confirm that, left to spontaneity, the market will be driven by a price leader, who the other participants in the market will follow, we believe that something more than a suspicion of culpability should properly stave an award of Summary Judgment. While, obviously, we view the evidence presented in a light most favorable to the nonmovant -- here the Plaintiffs -- the governing law makes clear, "[s]uch inferences * * * must be 'justifiable.'" Valley Liquors, Inc. v. Renfield Importers, Ltd., supra at 659. Accordingly, we need not view each of the evidentiary submissions as inferring complicitous wrongdoing, merely because a cramped, or inventive interpretation of that evidence, as driven by some assumption of unlawfulness, would arguably allow that result.

To do so, would improperly subject the oligopolist to the artificiality of a jejune existence, merely because conduct, which is a normal and innocent expression of natural, economic forces, can be "spun" into a suggestion of complicity. Our review of the caselaw, which we have heretofore detailed, makes clear that the Courts have remained vigilant to assure that a blameless emulation of pricing policies, by participants in an oligopoly, does not incur unwarranted reprobation. This would seem all the more obvious where, as here, the oligopoly has been impacted by both pure economic forces, and by the unavoidable skew that is bred through the well-intentioned, but invidiously intrusive, protectionist interests of one or more governments. Given this entanglement of fact, law and economics, the governing standard of review, and the dearth of evidence which tends to exclude the possibility that the complained of conduct was not the outcome of independent corporate will, we do not say that no price fixing conspiracy could possibly have existed, we merely conclude that the Plaintiffs have presented an insufficient showing to allow the issue to be submitted to a Jury.

With this perspective as our backdrop, we examine the Plaintiffs' evidentiary showings, as they have grouped them, in three categories of generalized proof, in order to examine whether a genuine issue of material fact has been demonstrated for a Jury's disposition. These categories -- namely, opportunity and motive behavior that is contrary to economic self-interest; and interfirm communications -- represent the "plus factors," that the Plaintiffs have relied upon, in conjunction with the evidence of price parallelism, in their effort to elude an award of Summary Judgment. Pltfs.'Jt.Opp.Memo. at 35-39. While we will follow the Plaintiffs' lead in compartmentalizing our discussion of this evidence, we have carefully reviewed this evidence as an blended whole, together with the Defendants' explanations for their conduct, so as to ascertain whether an "inference of

conspiracy is reasonable in light of the competing inference of independent action." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., supra at 588.[18] Since we conclude, following a considered review of the Record before us, that an inference of a conspiracy, which could justifiably arise from this Record, would consist of unreasoned speculation, we recommend that the Defendants' Motions be granted.

b. Opportunity and Motive. As to their first "plus factor," the Plaintiffs have asserted that, "from meetings of Canpotex[19] to the plethora of trade association meetings and telephone calls, the executives of defendants were in constant communication" -- ergo, the Defendants had an opportunity to conspire. Pltfs.'Jt.Opp.Memo. at 36. Nevertheless, while proof of an occasion to conspire may, as a practical matter, satisfy a necessary precondition of a conspiracy, "[a] jury cannot reasonably infer the existence of a conspiracy merely from the opportunity to form one." Utesch v. Dittmer, 947 F.2d 321, 331 (8th Cir. 1991), cert. denied, 503 U.S. 1006 (1992), quoting H.J., Inc. v. International Tel. & Tel. Corp., 867 F. 2d 1531, 1545 (8th Cir. 1989); see also, Coleman v. Cannon Oil Co., 849 F. Supp. 1458, 1469 (M.D.Ala. 1993) (quoting VI Areeda, §1417b at 97) (Evidence that the defendants "met together or telephoned each other * * * 'satisfies the necessary precondition of any traditional conspiracy that the parties have the opportunity to conspire', but 'it remains the

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[18] We note that, as one might expect, the Plaintiffs' "plus factors" roughly track the development of the alleged conspiracy. For example, the evidence of "motive and opportunity" generally corresponds to those months preceding April of 1987, whereas the evidence of "self-interest" and of "interfirm communication," approximates the period in which the Defendants are alleged to have conspired in fixing prices.

[19] Canpotex was a lawful cartel, created pursuant to Canadian law, which set prices for potash that would be sold outside of the United States. Pltfs.'Jt.Opp.Memo. at 36 n. 41.

plaintiff's burden to prove that the defendant succumbed to the temptation and conspired.'").

As a result, the Plaintiffs' evidence of informal communications among the alleged conspirators, standing alone, merely provides an opening for collusion, rather than unambiguous evidence from which a reasonable inference of concerted action can properly be drawn. See, Market Force Inc. v. Wauwatosa Realty, supra at 1172: Petruzzi's IGA v. Darling-Delaware, supra at 1242 n. 15. To infer a conspiracy premised upon the Defendants' association in Canpotex, upon their attendance at trade association meetings, or upon their telephone communications, without any showing that the those associations or communications were dedicated to concerted action, would be tantamount to condemning wholly lawful conduct, merely because the conduct could be abused by a malefactor. Since "opportunity" evidence can vary in its degree of persuasiveness, at this point, we defer our examination of the substance of these communications, and of the reasonable inferences that may be legitimately drawn therefrom. Instead, at this juncture, we merely acknowledge the obvious, that routine and justifiable contacts amongst competitors, such as the conduct of meetings and the participation in the affairs of business associations is, at best, evidence of a most ambiguous sort.

With respect to motive, there can be little dispute over the Defendants' recognition that each would benefit from a uniform increase in the price of potash. Indeed, as Professor Areeda has explained, "because competitors can profit from conspiring to fix prices, they are deemed to have the motive to do so." II P. Areeda & H. Hovenkamp, Antitrust Law §322g at 80 (1995) (hereafter "II Areeda"). Here, as a showing of motive, the Plaintiffs note that, on September 25, 1986, the then-president of PCS Sales, Rolf Holzkaemper ("Holzkaemper"), stated: "It is not possible for a single producer to affect a turn-around; however, joint action by a group of producers or governments could achieve this."

Holzkaemper Memorandum (PC 361765), attached as Tab 2, Pltfs.'Jt.Opp.Aff. In addition, the Plaintiffs have identified an undated document from PCS stating:

> Cannot wait for supply/demand to pull us up. Cannot do it alone. Industry must cooperate. Key is discipline.

Undated PCS Document (PC 2976752, attached as Tab 2, Pltfs.'Jt.Opp. Aff.

Further, the Plaintiffs have pointed to some isolated notations, from a meeting, on May 12, 1986, between certain representatives of PCS and Peat Marwick & Mitchell ("Peat Marwick"), which is an international consulting firm that had been retained by PCS.

On the basis of these notations, the Plaintiffs suggest that, during the conference of May 12, 1986, Peat Marwick proposed collusion as a strategy for returning PCS to profitability, by explaining that, "in order to increase prices there must be a reduction in supply," and by proposing "three possible solutions":

> a) Keep prices low in the short-term to force out marginal producers.
> b) That the industry arrange voluntary cut-backs or coordinated price increases.
> c) That the Government of Saskatchewan impose some form of rationing such as a special tax on producers in excess of, say 75% of their capacity.

Peat Marwick Meeting Notes (PC 337391-94), attached as Tab 2, Pltfs.'Jt.Opp.Aff.

At best, this evidence suggests that PCS, as well as its retained consultant, recognized the need to raise prices, and to cut the supply of available product, in the interdependent potash market. Moreover, as the Defendants point out, on

June 10, 1996, Peat Marwick clarified that it presented its scenarios "as the outcomes of potential policies that [might] be adopted by individual producers and/or government," and that, "[u]nder no circumstances did [it] suggest that PCS should try to 'arrange' an industry-wide capacity reduction or price increase in collusion with competitors." Peat Marwick Letter (PC 334476), attached as Exhibit 16, Defs.'Jt. Rep. Aff. Each of the notations, that the Plaintiffs have highlighted can just as readily be construed as a recognition of the need for discipline, in an interdependent market, and we see no tendency for these notations to exclude the possibility of independent business action, here on PCS's part.

As was true with the evidence of "opportunity," while the absence of "motive" may negate an inference of conspiracy, its presence is not sufficient to infer that a conspiracy has occurred. See, Reserve Supply v. Owens-Corning Fiberglass, supra at 51. "If [motive] were sufficient to show conspiracy, then parallel pricing, especially in oligopoly, would be automatically conspiratorial, but it is not." Id.

As well, the Plaintiffs have also focused upon discussions, between the Saskatchewan Government and two of the Defendants, which related to the antidumping investigation. Purportedly, by alluding to certain proposed agreements, this evidence is supposed to support a reasonable inference that the Defendants ultimately reached an agreement to fix prices. We disagree.

On September 29, 1986, Andrew Elliott ("Elliott"), of PCS, met with officials from the Saskatchewan Government to discuss the antidumping investigation. An interoffice Memorandum of October 7, 1986, which memorializes the discussion, states as follows:

> Gosselin [a Canadian Embassy official] raised the question of whether some form of an agreement might be reached between the Ad Hoc Group [American potash producers who initiated the

> investigation] and Saskatchewan potash producers. I responded that this might move us from the prospect of an anti-dumping investigation to an anti-trust investigation and asked what possible kind of agreement he had in mind. He mentioned assurance of "no more firesales" (the interpretation of our IRS sale last winter) and Canadians' staying out of natural markets for New Mexico (presumably a reference to Kalium's "incursion" into Texas). * * * I gave Gosselin no understanding that we had an interest in pursuing such an agreement.

Elliott Memorandum (PC 388233-36), attached as Tab 2, Pltfs.'Jt. Opp.Aff.

Despite the Plaintiffs' characterization of this discussion as "bordering on the illegal," Pltfs.'Jt.Opp.Memo. at 7, we fail to see how a proposal, from a governmental official, to settle a potential trade dispute between two countries, is indicative of a conspiracy, especially when that proposal is expressly rejected.

We are similarly unimpressed with the Plaintiffs' reliance upon a Memorandum of October 26, 1986, which was authored by William Deeks ("Deeks"), who was the President of Noranda, which was directed to John Gordon ("Gordon"), who was Noranda's Vice-President, and which records that Noranda learned of the antidumping investigation on October 21. The Memorandum reports the substance of Deeks' conversation with Hank Armstrong, who was an official with the Canadian Embassy, in Washington D.C. Deeks recounts the discussion, which included an initiative of the Canadian Government, as follows:

> An overall objective would be to see whether or not it would be possible from the Canadian end to put together a proposal to the United States, which on the one hand could avoid a trade action, on the

> second hand would introduce some supply management to the situation, and overall would result in higher prices and would avoid a highly political trade action.

Deeks Memorandum (NOR 955009), attached as Tab 6, Pltfs.'Jt. Opp.Aff.

As with the Elliott Memorandum, however, we do not view this evidence as supporting a suggestion that any of the Canadian producers colluded with any potash producers, American or Canadian. Indeed, contrary to the Plaintiff's suggestion, the Record is uncontroverted that no other producers attended this particular meeting. Deeks Deposition at 203, attached as Exhibit 18, Defs.'Jt.Rep.Aff.

Lastly, the Plaintiffs identify an alleged statement by Cliff Kelly ("Kelly"), who was then the President of Kalium, to the effect: "You know, why can't we just kind of draw a line across the country and let the Canadians keep north of it and Americans stay south of it and resolve the whole thing that way." Elliott Deposition at 27, attached as Tab 23, Pltfs.' Jt.Opp.Aff. Purportedly, Kelly made this remark at a "Federal/Provincial/Industry Meeting," on February 19, 1987. A telex from an official with the Canadian Government, which was addressed to other government officials and to the representatives of the various Canadian producers, including the Canadian Defendants, states that the purpose of the meeting was "to coordinate the defence against this antidumping action." February 13 Telex (AK 026421), attached as Tab 3, Pltfs.'Jt.Opp. Aff.

Apparently, the Plaintiffs invite us to infer that Kelly proposed an agreement that would divide the North American potash market. Nevertheless, consistent with Elliott's interpretation, as it was related at the time of his deposition, the statement can be as logically read as expressing sarcasm, voiced out of frustration over the commencement of the antidumping proceeding. The inference, that Kelly intended

to propose an agreement to conspire, is further undermined by the fact that Elliott has no recollection of a response to Kelly's remark, and by the reality that the antidumping proceeding was not settled on terms that were even remotely similar to those suggested by Kelly. Elliott Deposition at 27, attached as Tab 23, Pltfs.'Jt.Opp.Aff.

c. Acts Against Self-Interest. Next, the Plaintiffs urge that there is substantial evidence which reveals that the Defendants acted, on separate occasions, contrary to their own economic self-interest. As we have observed, the fact that a firm's action is against its self-interest might well be suggestive of the existence of a conspiracy. See, Admiral Theatre Corp. v. Douglas Theatre Corp., 585 F.2d 877, 884 (8th Cir. 1978) ("Only where the pattern of action undertaken is inconsistent with the self-interest of the individual actors, were they acting alone, may an agreement be inferred solely from such parallel action."). However, to support a reasonable inference of conspiracy, the conduct must reveal more than the mere recognition that an act is unwise -- unless it is followed by its rivals -- for it must competently disclose "individual action [that] would be so perilous in the absence of advance agreement that no reasonable firm would make the challenged move without such agreement." Coleman v. Cannon Oil Co., supra at 1467 (quoting VI Areeda, §1434c at 215).

Accordingly, our analysis of the Plaintiff's second "plus factor" -- the acts against self-interest -- includes evidence of conduct that, despite its economic rationality, the Plaintiffs claim could not have occurred in the absence of a prior collusive agreement. As Professor Areeda has explained, "if the actual defendants could not or would not have acted as they did without advance communication and understanding, then their action necessarily proves a traditional conspiracy." VI Areeda, §1425a at 144 (quoted in Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp., supra at 1119).

Whether the asserted parallel action reflects a reasonable response to a business exigency, or a collusive restraint of trade, requires a close analysis of several events which approximated the alleged inception of the conspiracy; namely, PCS's unilateral decision to raise the price of potash by $35 in September of 1987; the remaining Defendants' response to that price increase; the Defendants' entry into the Suspension Agreement; the Defendants' conduct in rebating the surcharge, and in imposing an $18 increase in the price of potash: PCS's decision to supply PCA's need for potash after PCA's mine was flooded; and, the alleged transformation of the potash industry in 1987. In evaluating this evidence, which is largely comprised of the reactions of certain Defendants to exceptional, and nonrecurrent, events in the potash marketplace, we are mindful of the policy concerns which discourage any substitution of our supposed business acumen for that of the Defendants in the legitimate management of their corporate interests.

i. The PCS September Price Increase. The Plaintiffs claim that PCS's decision to increase its price for potash by $35, within days after the DOC's announcement of the preliminary antidumping margins, is highly probative of a conspiracy. Pltfs.'Jt.Opp.Memo. at 9. To support this contention, the Plaintiffs rely on several arguments, none of which we find sufficient to raise a genuine issue of material fact.

At the outset, we consider Rausser's testimony that "Canadian potash producers may have been expected to increase price in order to cover the bond requirements imposed by these margins." Supplemental Rausser Rept. at ¶ 129, attached as Tab 60, Pltfs.'Jt.Opp.Aff. Rausser, however, believes that "the level of the price increase was generally greater than that required by the preliminary margins." Id. Apparently, the Plaintiffs are suggesting, albeit without supporting authority, that the size of the price increase, in and of itself, supports the inference of a conspiracy. However, as

one Court has noted, "were we to permit [a conspiracy claim premised on the theory that price hikes were too high], few pricing decisions would be immune from antitrust scrutiny." In re Coordinated Pretrial Proceedings, supra at 445 (observing that the Federal Courts are unsuited to act as rate-setting commissions). Perhaps more importantly, however, we conclude -- for reasons we later detail -- that the Defendants' explanations, for the $35 increase in their price for potash, are not only plausible, but they are logically consistent with an independent exercise of business judgment.

Next, the Plaintiffs point to Childers' testimony that, rather than to select an increase which would correspond to PCS's preliminary dumping margin, the $35 increase, which reflected the industry average margin, was lower than that required by the margins. Childers, however, testified that he chose the industry-wide average not only to recover the potential duty, but also to demonstrate the impact of the duty on its potash customers in the United States. Childers Deposition at 87-88, attached as Tab 17, Pltfs.'Jt.Opp.Aff. According to Childers, and as supported by the Record before us, PCS hoped that its customers, once they became aware that the duty would cause potash prices to rise, would exert pressure, on the United States Government, to terminate the antidumping proceeding. Id.; PCS Letter and Memorandum Addressing Lobbying Efforts (PC 33045 and PC 15542), attached as Tab 47, Defs.'Jt.Memo.Aff. In this same respect, Childers testified that, "[i]n order for [the program enlisting support from United States farmers] to be successful we felt like there would have to be others besides us charging this surcharge and we felt like if that was going to happen it was more likely to happen if we used an industry average as opposed to a PCS average." Childers Deposition at 87-88, attached as Tab 17, Pltfs.'Jt.Opp.Aff. We find Childers explanation to be plausible and apt in rebutting any conjectural inference that PCS had acted collusively.

Nor do we find that Childers' testimony, that PCS acted without a contingency plan, in the event that the surcharge was not followed, as cogently suggesting the presence of an agreement to collusively restrain trade. Childers Deposition at 91-91, attached as Tab 17, Pltfs.'Jt.Opp.Aff. In this respect, the Plaintiffs appear to ask that we infer, from this excerpt of Childers' testimony, that an agreement existed among the producers which obviated the need for an optional, contingency plan. Given the evidence in this Record, which corroborates the economic reality that unilateral price increases are quickly reversible, we conclude that Childers' failure to recall an "optional plan" is unavoidably, and indecipherably, ambiguous. Moreover, on August 25, 1987, Doyle authored a Memorandum, which was directed to the account managers at PCS, and which fully supports a competing inference; namely, that PCS did not know how its rivals would respond to the dumping duty. Doyle Memorandum (PC 50352), attached as Exhibit 7, Defs.'Jt. Rep.Aff. ("We are not sure that all our competitors intend to pass on this duty to their customers. Logic would dictate that they do so, but logic does not always prevail."). We find no unambiguous showing of collusion here.

Next, the Plaintiffs cite a Memorandum of May 7, 1987, from Childers to Gary Lane, who was also employed at PCS. In this Memorandum, Childers expressed concern that, due to the size of PCS, the antidumping investigation would place PCS at a much higher risk than its rivals. Childers Memorandum (PC 072520-26, attached as Tab 2, Pltfs.'Jt. Opp.Aff. Childers continued:

> Even more disconcerting is the probability that the other Canadian producers will be slapped with a lower duty than PCS. Some of our Saskatchewan co-producers wouldn't mind a duty as long as PCS is hit harder than they are, due to the obvious market implications.

Id.

On this tenuous showing, the Plaintiffs encourage us to deduce that a collusive agreement served to "alleviate" Childers' concerns. We are not so persuaded, however, for Childers' decision to increase the price of PCS potash by the industry average, rather than by its own, higher margin, does not meaningfully suggest that Childers' concerns, over PCS's competitiveness, had been effectively assuaged.

ii. Response to PCS's Price Increase. In addition to the size of the price increase, the Plaintiffs maintain that the "prompt response" by the other Defendants, as well as the fact that the increase was uniformly matched -- and not undercut by the other potash producers -- supports an inference of a conspiracy. We conclude, however, that an inference of conspiracy, which is based upon this showing, is unsound, particularly in view of the strong competing inference that the Defendants not only independently arrived at the $35 figure but, in doing so, they exercised understandable business judgment.

As we have noted, PCS announced the $35 price increase on September 4, 1987, and, by September 16, 1987, the remaining Canadian Defendants had followed suit. The Plaintiffs contend that "Kalium was aware of IMC's and Noranda's intention to increase their prices $35 before they announced," and that "Noranda was aware of Kalium's intention to raise prices before they announced as well." Pltfs' Jt.Opp. Memo. at 4 n. 7. As evidence for these assertions, the Plaintiffs highlight a Kalium document, which is dated September 10, 1987, and which states: "IMC considering increase" and "Noranda rumored to go up also." Kalium Document (AK 058720), attached as Tab 3, Pltfs.'Jt.Opp.Aff. The Plaintiffs also refer to a Noranda Memorandum, of September 4, 1987, which reports:

> Rumors rampant this week about imminent price increase in U.S.A. Kalium reported prepared to

publish revised price list $6 -$10 U.S./ton higher than current level.

Noranda Memorandum, dated September 4 1987 (NOR 408818), attached as Tab 6, Pltfs.'Jt.Opp.Aff.

Viewed in its own light, we are unable to infer from this evidence, without engaging in sheer speculation, that the Defendants provided advance notice of each others' pricing decisions, as the inference is equally plausible that Kalium and Noranda received the referenced "rumors" from their own customers. Not only was the Kalium price increase, which was listed in the Noranda Memorandum, inconsistent with the eventual $35 increase, but a Noranda document, which followed the first Memorandum by one week, stated as follows: "No definitely confirmed reports of price increases by other producers though rumors abound and make for interesting discussion." Noranda Memorandum, dated September 11, 1987 (NOR 408815), attached as Exhibit 2, Defs.'Jt.Rep.Aff.

The Plaintiffs also contend "that PCA knew before September, 1987 that the industry-wide $35 price increase was forthcoming." Plaintiffs' Memorandum in Opposition to Rio Algom/PCA Joint Motion ("Pltfs.'Rio Algom/PCA Opp.Memo.") at 4. To support this contention, the Plaintiffs point to a telex, which was dated August 27, 1987, and which was transmitted by J.P. Welch ("Welch"), who was PCA's Western Regional Manager, to J. Ripperger ("Ripperger"), the Vice President of Marketing and Sales at PCA. PCA Telex (XC 01637), attached as Tab 5, Pltfs.'Jt.Opp. Aff. In the telex, Welch states that he "cannot understand [PCA's] reluctance to take orders at current list price," and protests that "[PCA's] current policy is alienating our good customers, destroying morale among the salesmen and, most importantly, not moving one pound of potash." Id. Welch also expressed his fear that "while we are courageously supporting the industry vow of strengthening prices, we will again be left

with an unsold inventory." Id. According to the Plaintiffs, PCA's policy of not making sales at list prices "reflects PCA's foreknowledge that its competitors would be raising prices dramatically in the future." Pltfs.'Rio Algom/PCA Opp. Memo. at 4.

Without question, Welch's telex reveals a difference in opinion at PCA. However, on August 26, 1987 -- the day before Welch sent the telex -- Ripperger advised his sales force that, effective immediately, no new orders were to be accepted. Ripperger Telex (XC 152614), attached as Exhibit F, Rio Algom/PCA Jt.Memo., Declaration of Eric H. Queen ("Rio Algom/PCA Jt.Aff.") Ripperger has explained that this direction was given "in order to allow PCA to clarify its situation vis-a-vis the DOC's ruling [the preceding] Friday." Id. Given this explanation, we conclude that a legitimate inference does not arise from PCA's decision, to withdraw sales into the United States as an immediate response to the DOC's announcement of preliminary margins, since contemporaneous documentation discloses a rational business motivation which supports that response.

Indeed, another contemporaneous Memorandum at PCA bolsters an inference that, rather than learning about each others' prices from one another, the Defendants discovered the pricing decisions of their competitors by reports from their own customers. PCA Interoffice Memorandum (XC 74090), attached as Exhibit 51, Defs.'Jt.Memo.Aff. The Memorandum, which is dated September 8, 1987, was sent from PCA's Eastern Regional Office to Ripperger, and provides as follows:

> The following has been reported by customers to the Lebanon Regional Office this morning. Although we feel the information is accurately reported as the individual's best understanding of it, we would want additional time to confirm the factuality of the following: Sidney Clear, Southern States Coop,

> reported this morning PCS's price to them will be based on $58.00 per ton coarse, FOB mine site, plus a $35.00 per ton increase effective 9/7/87.

This Memorandum concludes with additional information, which pertained to the current potash pricing of one of PCA's rivals, and all of which was gleaned from third-party sources. In fact, the Memorandum reported that "no information to this point regarding price changes from Kalium," which suggests, when read in composite, that the potash industry routinely relied upon customer reports in canvassing the pricing policies of competing interests. Id.

As additional, suggestive evidence that the $35 increase was coordinated among the Canadian Defendants, the Plaintiffs identify an interoffice Memorandum which memorializes a meeting that occurred on August 31, 1987, between Gordon and two Saskatchewan Government officials; namely, Smith and Bob Reid, who was a Deputy Minister of Energy and Mines. In this Memorandum, Gordon related that he "reiterated [his] disapproval of [the prorationing legislation), and again suggested that via PCS the government could have prices increased." Gordon Memorandum (NOR 406038), at Tab 6, Pltfs.'Jt. Opp.Aff. Notwithstanding the Plaintiffs' claims to the contrary, we find this evidence to be unsupportive of a conspiracy, since contemporaneous records reveal that PCS had decided to increase its price for potash on August 24, 1987 -- one week prior to the Noranda meeting. Notes of Conference Call (PC 356389), attached as Exhibit 4, Defs.'Jt.Rep.Aff. Moreover, the Plaintiffs have offered no evidence to refute Smith's statement that her discussions with Gordon -- as well as her discussions and those of her staff, with the other potash producers -- were held in strict confidence. Declaration of Pat Smith at ¶6, attached as Exhibit 5, Defs.'Jt.Rep.Aff.

As further supporting their supposition, that an industry agreement was formed to follow PCS's pricing lead, the

Plaintiffs refer to an internal Memorandum, at Cominco, which is dated July 30, 1987, and which records a conversation between Reid and John Anderson, who was the President of Cominco. Cominco Memorandum (CA 10335), attached as Tab 7, Pltfs.'Jt.Opp.Aff.; Pltfs.'Com.Memo. at 2. In response to Reid's reference to the Provincial Government's intent to introduce prorationing legislation, Anderson commented as follows:

> I made the point that the price leadership being exhibited by the new management of PCS appears to be working and is accepted in the marketplace. While basic fundamentals have not changed (with one important exception -- potash producers have been so severely burned with losses that there may be much greater acceptance of price leadership and discipline in the market-place to prevent the recurrence of the previous two years). It is my feeling that the new pricing policies and apparent discipline of the market-place should be given an opportunity. If they fail at some future time, standby legislation as described above could be quickly put in motion. I think that my position fell on deaf ears.

In the absence of any evidence to responsibly suggest, however, that the Saskatchewan officials were being used by the Defendants as a conduit to privately communicate their individual pricing intentions to others in the industry, the Plaintiffs' attempt to portray a conspiratorial cast to the producers' separate discussions with the Provincial Government officials, in July and August of 1987, is unavailing. Likewise, we reject the Plaintiffs' entreaty that we infer a conspiracy from Anderson's use of the phrases "price leadership" and "discipline of the market-place." Without more, these phrases merely acknowledge, we think innocuously enough, the admitted interdependence of

competing interests in any oligopoly, such as the potash industry.

The Plaintiffs have also isolated an internal analysis of the dumping margins, by Cominco, as supportive of their view that Cominco's decision to match the $35 increase was not reasonable unless there was a prior understanding within the industry. This Memorandum, which was dated September 11, 1987, was drafted by Dale Massie, who was Cominco's Vice President of Marketing, and it directed the Accounting Manager at Cominco to begin "accruing monies from the sale of potash to cover potential dumping fees." Cominco Memorandum (CA 057930), attached as Tab 7, Pltfs.'Jt.Opp. Aff. The Plaintiffs underscore that the handwritten calculations on this Memorandum, which reflect a $16 accrual for granular grade potash, evince a conscious decision by Cominco to ignore its own internal analysis of the dumping margins, when it elected to match PCS's $35 increase on September 14. Id. We think the Plaintiffs' reliance on these calculations is misplaced, however, for neither they, nor the remainder of the Memorandum so much as suggest that Cominco intended to raise prices by $16 -- only that it sought to accrue that amount. Id. Of course, no conspiratorial inference is rationally prompted by a producer's failure to match a cost increase with an identical increase in price. Here, the unrebutted testimony of Cominco's management reveals that Cominco made its pricing decision without communicating with its rivals in the industry, and with the intent to achieve a competitive price level. Deposition of David Benusa at 230-31, attached as Tab 16, Pltfs.' Jt.Opp.Aff. Notably, except for this most attenuated argument, the Plaintiffs do not contend that it was unreasonable for Cominco to match PCS's price increase.

The Plaintiffs continue by arguing that IMC's and Kalium's decision to follow PCS's $35 increase made no economic sense, but for an agreement to fix prices. In the Plaintiffs' view, since IMC and Kalium were assessed

preliminary dumping margins which were below both PCS's and the industry average, each of the firms should have exploited their competitive advantage by undercutting the $35 price increase. Pltfs'.Jt.Opp.Memo. at 10.

In response, the Defendants urge that the decisions by Kalium and IMC, to forego an undercutting of the $35 price increase, evinces a sound exercise of business judgment on each of their respective parts. To support this urging, the Defendants note that the Saskatchewan Government enacted prorationing legislation in September of 1987, and that Kalium and IMC were each concerned that an effort to subvert its competitors' prices could trigger a punitive application of this legislation. Indeed, in a September 10, 1987, interoffice Memorandum of Christopher Williams ("Williams"), who was the Senior Vice-President at IMC, the trepidations of management were expressed as follows: "Primary concern for IMC is the threat of production controls -- if we don't follow will the government go out of their way to hurt us?" Williams Memorandum (ST 000001), attached as Exhibit 9, Defs.'Jt.Rep.Aff.[20] See also, Deposition of Clifford Kelly at 229, attached as Tab J, Kalium supplemental Memorandum, Transmittal Declaration of Lisa A. MacVittie ("Kal.Memo.Aff.").

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[20] Referring to Williams' Memorandum as a "mystery" Memorandum, the Plaintiffs imply that it would not be admissible at Trial. The Plaintiffs' objections are threefold: it is incomplete in that it ends in mid-sentence; it was produced several months after IMC's other documents were produced, and it bears a Bates number that is out of sequence with those earlier documents; and, although it is dated September 10, 1987, it refers to events that are dated September 11, 1987. Pltfs.'IMC Opp.Memo. at 2-3. We do not agree that these asserted anomalies would, necessarily, render the Memorandum inadmissible but, in any event, the unrebutted testimony of the Memorandum's author, Kip Williams, reveals that IMC did not attempt to undercut the $35 increase because "we were concerned with the production controls." Deposition of Christopher C. Williams at 64, attached as Tab 56, Pltfs.'Jt.Opp.Aff.

Although the legislation was never implemented, the Plaintiffs have provided no evidence that IMC or Kalium had no cause for concern. Indeed, during July and August of 1987, Saskatchewan officials met separately with the Canadian producers to inform them about the potential impact of the prorationing legislation. Declaration of Pat Smith at 16, attached as Exhibit 5, Defs.'Jt.Rep.Aff. Following one of these meetings, Richard Hedberg, who was the Executive Vice-President of IMC, advised Reid that IMC was not in favor of Government control programs. Hedberg Letter dated August 7, 1987 (MI 61170), attached as Exhibit 5, Defs.'Jt.Rep.Aff. Moreover, the Plaintiffs' contention, that Billie Turner, who was the President of IMC, "had no understanding that increasing IMC's market share would lead to production restraints," is clearly not supported by his deposition testimony. Plaintiffs' Reply to IMC Memorandum at 2, citing Deposition of Billie Turner at 144, attached as Tab 51, Pltfs.'Jt. Opp.Aff. In fact, in referring to the prorationing legislation, Turner testified that, "[h]aving a long history with that province, I had no question in my mind that they were prepared to take drastic action to protect their industry, particularly since they owned almost half of it." Id. at 147-48.

In addition to its comprehendible concern over the potentiality of prorationing, Kalium asserts that any inference of collusion, based on its failure to cut prices so as to generate additional revenues, is negated by the fact that it was then operating at its maximum practicable capacity. Kalium Supplemental Memorandum at 4. Notwithstanding the Plaintiffs' expressed disbelief, the Record before us corroborates Kalium's claim that, during the relevant period, it was operating at or near full capacity -- about 92 percent -- for the coarse and granular grades of potash, which were the varieties that accounted for the vast majority of its market in the United States. See, Deposition of Clifford Kelly at 229, attached as Tab J, Kal.Memo.Dec.; and Declaration of John Huber at ¶¶12-18, attached as Tab F, Kal.Memo.Dec.;

Rausser Rept. at ¶7, attached as Tab 59, Pltfs.'Jt.Opp.Aff. (coarse and granular grades accounted for 84% of the market during the 1983-1992 period).

For instance, compaction difficulties reduced Kalium's granular grade production from 91.1 percent to 86.1 percent in 1988. Declaration of John Huber at ¶16, attached as Tab F, Kal.Memo.Dec. Although the Plaintiffs suggest that Kalium should have installed compactors at a rate faster than one per year, the testimony of Kalium's expert, Frederic Scherer, remains unrebutted that it would have been counter-productive for Kalium to have added compactors at a faster rate than had been accomplished. Deposition of Frederic Scherer at 186, attached as Tab K, Transmittal Declaration of Frederick S. Young, Kalium Supplemental Reply Memorandum ("Kal.Rep.Dec."). Moreover, Kalium maintains that, because it utilized its fine and standard grades of potash in the production of the more lucrative granular variety, it lacked a compelling economic incentive to sell all of its fine and standard grades, and that, in any event, there is a direct correlation between the price of all of the potash grades in the industry. Declaration of John Huber, at ¶¶20 and 23, attached as Tab F, Kal.Memo.Dec. Nor have the Plaintiffs presented any evidence that IMC had the capacity to increase its sales volume, as would have to be the case if it were to profit from undercutting the $35 price increase. Given this Record, to infer that IMC and Kalium would have obtained greater profits by underbidding the $35 price increase amounts to nothing other than conjecture.

Lastly, we think it worthy of reiteration, that an advance, collusive agreement is not an inevitable rationale for price matching in an oligopoly. In this respect, we find the reasoning of the First Circuit, in Clamp-All, worthy of reemphasis:

> A firm in a concentrated industry typically has reason to decide (individually) to copy an industry

> leader. After all, a higher-than-leader's price might lead a customer to buy elsewhere, while a lower-than-leader's price might simply lead competitors to match the lower price, reducing profits for all. One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry.

Clamp-All Corp. v. Cast Iron Soil Pipe Institute, supra at 484.

Based upon this same reasoning, the Seventh Circuit has held that it was not irrational for two insulation manufacturers to raise their prices in a period of reduced demand. Reserve Supply v. Owens-Corning Fiberglass, supra at 52. As was the case in the potash market, the demand for insulation, at least at the time of the Court's review in Reserve Supply, was inelastic. Therefore, the only new customers which would have been accessible were those who were currently being serviced by the defendants' competitors. In granting Summary Judgment for the defendants, the Court explained that the defendants' decision "to forego this option[,] [of cutting prices in an attempt to increase market share,] does not suggest that they 'acted in a way that, but for a hypothesis of joint action, would not be in [their] own self-interest.'" Id., quoting Illinois Corporate Travel Inc. v. American Airlines, Inc., 806 F.2d 722, 726 (7th Cir. 1986).

Accordingly, after careful review, we conclude that the explanations, of the low-margin producers, for deciding to follow, and not to undercut, the $35 price increase, are as economically plausible, or are more so, than the conspiracy-driven conclusion that the Plaintiffs would have us reach.

iii. Entry Into Suspension Agreement. The Plaintiffs claim, with the support of their expert, that the Defendants' participation in the Suspension Agreement creates an inference of conspiracy. Rausser Rept. at ¶ 22,

attached as Tab 59, Pltfs.'Jt.Opp.Aff.[21] As had been their urging with respect to the decision of IMC and Kalium to match the $35 price increase, the Plaintiffs claim that the entry of the low-cost Defendants into the Suspension Agreement was an act of economic irrationality since, in accepting that Agreement, they failed to exploit a potential competitive advantage. We conclude, however, that the Plaintiffs' assertion is, again, a resort to unfounded supposition.

In Rausser's view, the Suspension Agreement destroyed the low-cost producers' competitive advantage in having low tariffs, because the Agreement "had the effect of requiring all producers to raise their prices equally." Id. However, Rausser's opinion is not supported by the plain language of the Agreement, which incorporated each producer's preliminary dumping margin in the Agreement price. Indeed, in his Supplemental Report, Rausser appears to acknowledge this point but, nevertheless, he maintains that, because the DOC did not monitor the individual firms, the agreement, in practical effect, imposed a single price floor. Supplemental Expert Report of Gordon C. Rausser at 120, attached as Tab 60, Pltfs.' Jt.Opp.Aff. Nonetheless, Rausser equivocates somewhat by opining that, if the Agreement imposed different price floors, "low margin firms have been giving away a competitive advantage on a daily basis by not pricing under the price floor of the high margin firms." Id.

Regardless of whether the price floor effectively required a single price, we find Rausser's argument to be unavailing,

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[21] With respect to both PCA and Noranda, which were high-cost producers, the Plaintiffs' expert testified that each acted in a manner, that was consistent with their own self-interest, by entering into the Suspension Agreement. Deposition of Gordon Rausser at 539 and 655, attached as Exhibit 54, Defs.'Jt. Memo.Aff. The following testimony is illustrative: "I believe PCA was above the average [of the preliminary dumping margins]. So the response to your question would be that they would prefer [to enter the Suspension Agreement]." Id. at 655.

for it requires a factfinder to infer irrationality from the decision of low-cost producers to sacrifice market share for higher product prices. As we previously noted with respect to Kalium, even if it had desired to expand its market share, it was logistically unable to do so. Moreover, there is ample evidence that, even after its entry into the Suspension Agreement, IMC was apprehensive that any attempt on its part to increase market share would trigger a price war which, in turn, could provoke the cessation of that Agreement, or the imposition of production controls, or both. See, IMC BBT Letter - Strategic Issues/Planning (MI 45846), dated August 9, 1989 ("Dumping remains an issue -- Market share concerns continue (production quotas)"); IMC Strategic Issues Memorandum, dated October 18, 1989 (MI 0928300) ("As you know, we have also been concerned about production controls if our market share moves up too far."); IMC Strategies Memorandum (MI 458971), dated November 29, 1989 ("Revival of dumping investigation would only take place if the price of potash drops materially[;] [i]t is our objective, therefore, to keep the price of potash up as well as maintain our compliance with the guidelines provided under the suspension agreement."); IMC Response to Issues Memorandum, dated December 7, 1989 (MI 45035) ("To achieve a larger [market] share would risk dissolution of the Suspension Agreement and pose potential dumping concerns; [i]t could also lead to production controls."), attached as Tab 2, IMC Reply Memorandum Affidavit of John French ("IMC Rep.Aff."); IMC Price Guidelines, dated August 23, 1990 (MI 7112) (calculations of estimate minimum U.S. price guidelines relative to the suspension agreement), attached as Exhibit 31, Defs.'Jt.Rep.Aff.; Suspension of Antidumping Duty Investigation: Potassium Chloride From Canada, Article V.C., 53 Fed.Reg. 1393, 1394 (January 19, 1988) ("the Department reserves the right to modify its methodology in calculating United States price and foreign market value."), attached as Exhibit 35, Defs.'Jt.Memo.Aff.

Indeed, the Record discloses several occasions when IMC determined that it was unable to make a specific sale, or even to participate in a particular market, because of the Suspension Agreement. See, IMC Memorandum dated April 14, 1988 (MI 60513) (observing that IMC is unable to participate in the Southeast); IMC Memorandum, dated September 18, 1989 (MI 7798) (stating that IMC either needs "better freight rates, take a different view on dumping, or hope for a big price improvement" to attract business in the Southeast); IMC Letter to Customer, dated October 26, 1989 (MI 9409) (refused sale); IMC Letter to Customer dated August 30, 1990 (MI 9367) (refused sale), attached as Exhibit 31, Defs 'Jt.Rep. Aff.

The Plaintiffs' evidence, on this aspect of the Suspension Agreement, is ambiguous for an additional reason. As is the case with any settlement, the Suspension Agreement avoided an uncertainty, and the economic risks that attended that uncertainty. Had a final determination been entered against the Canadian Defendants, each producer would have been required to make a cash deposit on all exports to the United states which, depending upon the size of the margin, had the distinct prospect of significantly affecting the company's cash flow. See, Title 19 C.F.R. §353.21(b); Expert Report of William H. Barringer at ¶¶6-8, attached as Exhibit 59, Defs.'Jt.Memo.Aff. Moreover, the dumping margins were preliminary, and were subject to reassessment, as is confirmed by the United States petitioners' request for an upward revision in some of the companies' margins. For IMC, these risks included the possibility that a recalculation of its duties would have included additional costs which, in turn, would have had the effect of raising its dumping margin. In this respect, Turner testified that if IMC's water costs were included in their margin, "we [would] not [be] the lowest producers by a long shot." Deposition of Billie Turner at 154-56, attached as Tab 2, IMC Rep.Aff. We cannot say that

it was implausible for a Canadian potash producer to hedge against these risks.

Our conclusion on this point finds further support in the view taken by the United States Department of Justice, and by the Federal Trade Commission ("FTC"), that the entry of an Agreement to terminate a dumping action is entitled to an implied immunity from the applicable anti-trustlaws. U.S. Department of Justice, U.S. Federal Trade Commission Antitrust Enforcement Guidelines for International Operations (April 1995)(Example M), attached as Exhibit 61, Defs.'Jt.Memo.Aff. Under the guidelines issued by the Justice Department and by the FTC, a scenario is addressed in which foreign producers are assessed preliminary dumping margins of 10 to 40 percent. Id. Thereafter, the foreign producers jointly initiate discussions with the DOC that lead to the suspension of the investigation. The suspension agreement provides that each producer will sell its product in the United States at a price not less than its individual foreign market value. Before determining to suspend the investigation, the DOC provides copies of the proposed agreement to the U.S. producers, who jointly advise the DOC that they do not object to the agreement on the proposed terms. According to the Justice Department, and the FTC, the hypothetical scenario envisioned no antitrust violation. In this respect, the Guidelines explain:

> While an unsupervised agreement among foreign firms to raise their U.S. sales prices ordinarily would violate the Sherman Act, the suspension agreement outlined above qualified for an implied immunity from the antitrust laws. As demonstrated here, the parties have engaged only in conduct contemplated by the Tariff Act and none of the participants have engaged in conduct beyond what is necessary to implement that statutory scheme.

Notably, the Plaintiffs have made no attempt to distinguish the present case from the scenario illustrated in the guidelines and, frankly, none readily comes to mind.

In sum, we conclude that the conduct of the Defendants, in entering the Suspension Agreement, was not a collusive act, and is as readily and plausibly explained by sound business practices, as it is by the Plaintiffs' suspicions of complicity.

iv. NMP/Eddy Pricing Behavior. Although not argued in their Joint Brief, the Plaintiffs contend that, by following the prices of their Canadian rivals, NMP/Eddy "failed to maximize the price advantage it had during the conspiracy period." Pltfs.'NMP/Eddy Opp.Memo. at 3. In the Plaintiffs' view, had NMP/Eddy acted in its own best interest, it would have exploited the Canadian producers' inability to lower their prices, under the Suspension Agreement, by increasing its U.S. sales "as much as possible." Id. at 4. Instead, the Plaintiffs' assert, NMP/Eddy continued to export much of its production despite receiving lower revenues from those sales. Upon close review, however, the Plaintiffs' evidence in this respect is inconsiderable, and what there is can be explained by reasonable business judgment.

Notwithstanding the Plaintiffs' theorizations, the Record demonstrates that NMP/Eddy increased its share of the United States potash market, at the expense of the Canadian producers, after the January 1988 Suspension Agreement. See, Expert Report of Louis A. Guth at Exhibit 16 (showing NMP/Eddy's domestic market share increasing from 4.78 percent, in 1986, to 9.08 percent, in 1989, whereas the Canadian producers market share dropped from 80.15 percent to 68.11 percent, over the same period), attached as Exhibit Q, NMP/Eddy Jt.Memo.Aff.; Deposition of Gordon Rausser at 1033 (conceding that NMP/Eddy increased sales after the Suspension Agreement at the Canadian producers' expense in the mid-South and Midwestern United States), attached as

Exhibit 1, NMP/Eddy Reply Memorandum, Affidavit of Steven A. Marshall ("NMP/Eddy Jt.Rep.Aff.")

Moreover, while it is true that NMP/Eddy received lower revenues from its export sales, in comparison to its sales made in the United States, the Plaintiffs' argument ignores the fact that NMP/Eddy's mines produced a disproportionate amount of the standard grade of potash. See, Expert Report of Louis A. Guth at Exhibit 23, attached as Exhibit Q, NMP/Eddy Jt.Memo.Aff.; Deposition of Niven Morgan at 57 ("[W]e didn't have * * * much capability on what we produced, and we produced more standard than anything else, even though we didn't want it."), attached as Exhibit 3, NMP/Eddy Jt. Rep.Aff. However, as the Plaintiffs' expert has admitted, because there is little demand in the United States for the standard grade of potash, most potash exported out of the United States consists of that grade. Deposition of Gordon Rausser at 1009-1010, 1021, attached as Exhibit 1, NMP/Eddy Jt.Rep.Aff.; Deposition of Niven Morgan at 58 ("[Standard] was a product that had very little demand in the United States any longer."), attached as Exhibit 3, NMP/Eddy Jt.Rep.Aff. This evidence reveals that, in reality, NMP/Eddy had little alternative but to sell their inventory of standard grade potash to its export market. In addition, the evidence reveals that NMP/Eddy had not abandoned the United States market, for they were engaged in efforts to increase their capacity to produce the more desired grades of potash. Expert Report of Louis A. Guth at ¶ 33, attached as Exhibit Q, NMP/Eddy Jt.Memo.Aff.

The Plaintiffs next refer to a Memorandum, dated December 31, 1991, from Dean McWilliams ("McWilliams"), who at that time was the Executive Vice President of NMP, to Dick Marshall ("Marshall", who was then a new sales representative, as demonstrating that NMP/Eddy had failed to exploit the Canadian producers' inability to lower their prices. In this Memorandum, McWilliams notes that NMP's prices did not match those of

its Canadian rivals, and he authorized Marshall "to meet prices, at the dealer level, which net back to Carlsbad the posted Canadian price F.O.B. mine." NMP Memorandum (MN 003551), attached as Tab 8, Pltfs.'Jt.Opp. Aff. Contrary to the Plaintiffs' assertion, however, this Memorandum does not limit potash sales at these prices but, rather, simply advises Marshall that "[a]ny other competitive pricing will require [McWilliams'] approval." Id. We conclude that this Memorandum reveals nothing more than a limitation, that was placed on Marshall, in deviating from NMP's price list.

In light of the evidence of Record, that NMP/Eddy increased its domestic market share, at the expense of their Canadian rivals, and further, that it had no alternative but to export much of the potash that it produced, we conclude that the Plaintiffs' contention, that NMP/Eddy acted contrary to its economic self interest by not increasing sales "as much as possible," does not raise a reasonable inference that NMP/Eddy participated in an alleged conspiracy.

v. Refund of Surcharge and $18 Increase. After they entered into the Suspension Agreement, all of the Canadian producers rebated the $35 surcharge, and increased their potash prices by $18. We are asked by the Plaintiffs to conclude that this could not have occurred without a prior agreement to that effect.

As evidence of a coordinated price increase, the Plaintiffs cite a Canpotex Memorandum, that is dated January 8, 1988, and that is directed to its "agents and officers." Canpotex Memorandum (CTX 1229), attached as Tab 9, Pltfs.' Jt.Opp.Aff. The Memorandum provides as follows:

> FYI Canadian potash producers have reached agreement with the United States Department of Commerce and all dumping action has been suspended for a minimum of 5 years. It is rumored that the USD 35.00 per metric ton increase posted by Canadian producers in 1987 to cover possible tariff

> payments to the U.S. Govt will be refunded in full or part. In the meantime new price lists are being issued on Monday Jan. 11 at: Standard Grade USD 80.00; Coarse Grade USD 84.00; Granular Grade USD 86.00.

By January 22, 1988, all of the Canadian Defendants, with the exception of Kalium, had issued price lists with prices that matched those announced in the Canpotex Memorandum.[22] The Plaintiffs infer, from the contents of this Memorandum, that all of the Defendants had previously agreed to charge these prices. However, on the same date that Canpotex issued this Memorandum, PCS announced these prices, in a telex to its customers, which advised that "[p]rice lists [would] be mailed on Monday, January 11." Telex to Customer (NOR 416856), attached as Exhibit 11, Defs.'Jt. Rep.Aff. As a consequence, the Memorandum does not assist the Plaintiffs in proving the existence of an alleged conspiracy, since it does not tend to exclude the possibility that Canpotex learned of the price lists from a customer of PCS.

Further negating an inference of conspiracy is the undisputed evidence that the Canadian producers did not uniformly increase their prices on January 11, but rather, they announced their price lists at various dates throughout the following eleven days. See, e.g., Kalium Price List effective January 11, 1988, dated January 11, 1988 (AK 620389), attached as Tab 3, Pltfs.'Jt.Opp.Aff.; Cominco Price List effective January 11, dated January 12 (CA 53361), attached as Tab 7, Pltfs.'Jt.Opp.Aff.; Noranda Price List effective January 11, dated January 14 (NOR 00000021), attached as Tab 6, Pltfs.'Jt.Opp.Aff.; IMC Price List effective January 18, undated (MI 094090), attached as Tab 4, Pltfs.'Jt.Opp. Aff.;

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[22] Kalium's price list reflected prices for each grade of potash which were one dollar higher than that announced in the Canpotex Memorandum. Kalium January 11, 1988 Price List (AK 620389), attached as Tab 3, Pltfs.'Jt.Opp.Aff.

PCA Price List effective January 18, dated January 22 (XC 168657), attached as Tab 5, Pltfs.'Jt.Opp.Aff. Of course, evidence that the alleged conspirators were aware of each other's prices, before announcing their own prices, "is nothing more than a restatement of conscious parallelism, which is not enough to show an antitrust conspiracy." Market Force Inc. v. Wauwatosa Realty Co., supra at 1172 (evidence that real estate brokers had circulated information about each others' commission policies, and that commissions tended to become uniform after this information had been circulated, was not sufficient to show a conspiracy).

The Plaintiffs have also presented evidence, which they believe demonstrates that NMP had advance notice of the potash prices prior to their announcement, by the Canadian producers, in January of 1988. As we have addressed, shortly after the entry of the Suspension Agreement, the Canadian producers raised their price for potash by $18, so as to reach a total price of $86 per ton on the granular grade of potash. On September 15, 1987, NMP issued price lists which contained one price that would be effective through December 31, 1987, and a higher price that would be effective from January 1, 1988, forward. Given these pricing decisions, the Plaintiffs have directed our attention to NMP's announced January price of $92.50, which they assert was "virtually the exact price required to place the American producers at the traditional differential of approximately $6 between Canadian and American prices." Pltfs.'Jt.Opp. Memo. at 10. While it is true, that the Record supports the fact that Canadian and American potash prices traditionally varied by $6, see, Deposition of Niven Morgan, Jr. at 30, attached at Tab 38, Pltfs.'Jt.Opp.Aff., it remains implausible that, in September of 1987, when NMP issued its price list, it could have clairvoyantly known that the DOC, and the Canadian producers, would reach an agreement in the following January, let alone what the impact that settlement agreement would have upon the price of potash. Indeed, the margins

were announced only several weeks before NMP announced its January potash prices, and well before any settlement negotiations had even taken place. Given this inconceivability, we are compelled to conclude that a factfinder should not be allowed to infer, on nothing more than a hunch, that NMP was privy to pricing information prior to its public announcement. See, Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp., supra at 1121 (quoting VI Areeda §1425 at 146) (To infer a conspiracy from parallel behavior, the conduct "cannot arise from a 'plausible coincidence or an expectable response to a common business problem.'").

Lastly, the Record makes clear that the Defendants did not conspire to rebate the surcharge.[23] While PCS initially promised that it would refund the surcharge in the event that the duties should not, ultimately, be imposed, the remaining producers, albeit with reluctance and under pressure from their customers, decided to follow suit, although not on uniform terms. See, e.g., PCS Letter dated February 23, 1988 (PC 24093) ("At the time we added the $35.00 to our prices we indicated to our customers that if the investigation ended without a requirement that we pay the duties we would return to our customers the surcharge amounts they had paid."), attached as Exhibit 52, Defs.'Jt.Memo.Aff.; Kalium Letter dated January 15, 1988 (AK 101641) (credit notes to be issued "reflecting the spring price for your fall purchases with appropriate early purchase discounts and an additional credit

[23] In fairness, at the Hearing on this Motion, Plaintiffs' counsel disavowed any claim of conspiracy that was predicated upon the Defendants' decision to rebate the surcharge. See, Transcript of Summary Judgment Hearing at 107 ("They didn't conspire to give back the 35, but they conspired to raise it 35 bucks but some of them gave it back, you know, kicking and screaming.") Nevertheless, the Plaintiffs' Memorandum pointedly implies that the occurrence of the rebates suggested a prior agreement, as follows: "The circumstances surrounding the Suspension Agreement and the attendant price rollback are also indicative of a conspiracy." Pltfs.'Jt.Opp.Memo. at 11.

of 1% per month to cover your cost of money", attached as Exhibit 13, Defs.'Jt.Rep.Aff.; PCA Memorandum dated February 2, 19888 (XC 228129) (refund to be issued only where and when necessary, "as the result of a previous agreement or due to competitive pressure"), attached as Exhibit 13, Defs.'Jt.Rep.Aff.; PCA Memorandum dated March 9, 1988 (XC 150364) ("The IMC and PCS approach to the $35.00 rebate is literally a dagger at our throats[‘] [for,] [i]f we attempt to come out with a less lucrative program in the eyes of the market, then I am afraid we will place ourselves permanently at the end of the suppliers' line."), attached as Exhibit 13, Defs.'Jt.Rep.Aff.; Noranda Memorandum dated November 10, 1987 (NOR 475571) ("We will consider making retroactive price adjustments after conclusion of the dumping case is final if this is necessary to maintain a competitive pricing policy; but it is not our policy that this will be initiated or automatic on Noranda's part even if the outcome of the dumping case is positive."), attached as Exhibit 13, Defs.'Jt. Rep.Aff. Accordingly, even if there was a conspiratorial agreement amongst the Defendants to fix prices, the agreement did not include any decision to refund the $35 surcharge, and the Plaintiffs' claim on that ground must fail.

vi. PCS's Decision to Supply PCA with Potash. Next, the Plaintiffs argue that PCS's decision, to supply PCA with potash for resale during the period, in 1987, in which PCA's mine was flooded, makes no economic sense. In support of this argument, the Plaintiffs assert that, without an independent source of potash, PCA would not have been able to service the supply needs of its customers. In the Plaintiffs' view, since other potash producers were operating with substantial excess capacity, these producers would have been able to supply PCA's customers and, thereby, to acquire PCA's market share. Rausser Rept. at ¶20, attached as Tab 59, Pltfs.'Jt.Opp.Aff. Accordingly, the Plaintiffs maintain that, rather than co-opting PCA's customers, PCS chose to

supply PCA with potash, at "substantially less profit to PCS than PCS could have made simply by supplying some or all of PCA's customers itself." Pltfs.'Jt. Opp.Memo. at 39.

The most that we can say about this transaction, between PCS and PCA, is that it has an enigmatic basis. For one, PCS agreed to enter into its supply agreement with PCA in February of 1987, which was not only prior to Childers' arrival at PCS, but also several months before the date of the alleged conspiracy. More importantly, however, contemporaneous PCS documents disclose PCS's concern that PCA would be supplied by one of its rivals, if PCS did not agree to do so. On February 3, 1987, PCS internally reported that, "[i]f PCA is seriously considering reopening the mine, they will probably want to maintain their marketing organization by purchasing product from other producers." PCS Interoffice Memorandum, dated February 3, 1987 (PC 3311), attached as Exhibit 15, Defs.'Jt.Rep.Aff.

Thereafter, on February 5, 1987, an interoffice PCS Memorandum, which was directed to Holzkaemper, who then served as the president of PCS, stated that "[w]e stand the risk that competitors will bid at very attractive prices for specific portions of the business and their cherry-picking may allow them to offer more attractive prices than PCS Sales." ACS Interoffice Memorandum, dated February 5, 1987 (PC 74926), attached as Exhibit 15, Defs.'Jt.Rep.Aff. This same concern was reiterated during a meeting of PCS's Board of Directors, on March 4, 1988. As reported in the notes of that meeting: "If [PCA] had not been able to purchase product from PCS Sales it would have purchased the product elsewhere as there was sufficient excess capacity available to meet PCA demand either from within the Canadian potash industry or offshore or a combination." PCS Meeting Notes (PC 69787), attached as Exhibit 15, Defs.'Jt.Rep.Aff. These meeting minutes also reveal that PCS earned a profit from its sales to PCA. Id. ("The contract with PCA returns a profit to PCS Sales.") Given these circumstances, and in view of the

absence, in this Record, of any showing that PCS could, in fact, have done better by soliciting PCA's customers, we conclude that an inference of a conspiracy, on the basis of this transaction, would invoke impermissible speculation.

vii. December of 1989 Price Decrease. The Plaintiffs propose that PCS sharply reduced its potash prices, in December of 1989, in order to retaliate against "those who broke ranks." Pltfs.'Jt.Opp.Memo. at 24. In fact, on December 18, 1989, PCS did institute what it termed a "Market Correction Program," which reduced the price of potash by $18. In a letter of the same date, Carlos Smith ("Smith"), who was the Director of U.S. Sales at PCS, advised that the price reduction would be available for only five days. See, PCS Smith Letter (AK 102128), attached as Tab 3, Pltfs.'Jt.Opp.Aff.

In contrast to the conclusion that the Plaintiffs would have us reach, contemporaneous documents, as well as deposition testimony, show that the price reduction program was designed, at least in part, to stabilize the market price for potash. First, the Smith letter concludes with the following statement of purpose: "We believe this program will be beneficial to our customers by helping to stabilize the market so we all may be in a position to profit from what promises to be a good spring 1990." Id. In addition, Smith echoed his belief, during the course of his deposition, that the program was "to try to level pricing." Deposition of Carlos Smith at 133-38, attached as Tab 47, Pltfs.'Jt.Opp.Aff. The following excerpt, which was cited in the Plaintiffs' Memorandum, is illustrative:

> Q: Well, was [the] market correction program meant to level just PCS's prices?
>
> A: Industry.

Q: It was meant to level the industry prices, PCS, IMC, Noranda and the rest of them correct?

A: Yes.

Q: I don't mean to leave anybody out. Okay. And did it work?

A: It leveled them.

* * *

Q: When you say level it, was it an attempt to stabilize prices?

A: Yes.

Q: And when you say stabilize the market, you're talking about stabilize the price of all PCS and its competitors?

A: Yes sir.

Moreover, a PCS Memorandum of April 11, 1990, from Smith, Gary Snyder ("Snyder"), who was PCS's Account Manager, and Jerry Jackson ("Jackson"), who was PCS's Director of National Accounts and Field Sales, to all of PCS's district and account managers, discloses that PCS sought to stabilize the market prices in order to obtain its full list price. PCS Memorandum (PC 023104) ("Looking back to the Market Correction Program and its purpose is just a reminder that our primary objective then and now is to obtain full list price."), attached as Tab 2, Pltfs.'Jt.Opp. Aff.; Deposition of Jerry Jackson at 150, attached as Tab 32, Pltfs.'Jt.Opp.Aff.

Standing alone, however, an attempt by one member of an oligopoly to exercise price leadership, by reducing its

price, is not unlawful. As the Supreme Court recently observed, in Brook Group v. Brown & Williamson Tobacco, 509 U.S. 209, 223-24 (1993), it would be an unsound expression of antitrust policy to discourage a price leader, in an oligopolistic market, from reducing its price. The Court explained:

> Even in an oligopolistic market, when a firm drops its prices to a competitive level to demonstrate to a maverick the unprofitability of straying from the group, it would be illogical to condemn the price cut: The antitrust laws then would be an obstacle to the chain of events most conducive to a breakdown of oligopoly pricing and the onset of competition. Even if the ultimate effect of the cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy.

Id.

As a result, evidence that PCS lowered its price, in a unilateral effort to stabilize the price of potash, does not, by itself, support a reasonable inference of conspiracy. Indeed, as Rausser has testified, retaliatory behavior by one supplier against a rival is not, necessarily, collusive behavior. Deposition of Gordon Rausser at 739, attached as Exhibit 54, Defs.'Jt.Memo.Aff. Moreover, while it is not possible to ascertain what constituted a "supracompetitive price," the Defendants assert, and the Plaintiffs do not controvert that, "[a]t the time of the filing of the complaints, U.S. potash prices were lower than at any point since the price war that prevailed in the mid-1980s, before the initiation of the antidumping proceeding." Defs.'Jt.Memo. at 11.

Nevertheless, the Plaintiffs proffer evidence which they claim demonstrates that the Market Correction Program was aimed at producers who cheated in the marketplace by making "sales at lower prices * * * after a December 1 'cutoff date.'" Pltfs.'Jt.Opp. Memo. at 24. To support this claim, the Plaintiffs offer a handwritten note of John Huber ("Huber"), who was the President of Kalium, which contains the following language:

> 1) Program was a market correction. Weren't trying to teach other people -- only got tired of people who kept chipping away.
> 2) Program was reasonable one. Checked with people.
> 3) People started cheating. Ind. Farm Bureau -- own program. Hudson by Amax and MCC -- 25 barges. [Kaiser] Estech -- Isreali vessels.
> 4) We wanted to get their attention.
> Program to be short, very specific.
> 5) IMC extended to 29th.
> 6) Didn't want shipments after Dec. 1.
> 7) Will do everything we can to promote profitability. If gains continue, another program.
> 8) There running at 46% of capacity.
> 9) Have idle capacity more than IMC's [illegible].
> 10) Dumping -- lowered cost -- 30 percent.
> Equity to Debt -- 10 to 1.

Huber Note (AK 026115), attached as Tab 3, Pltfs.'Jt.Opp.Aff.; Deposition of John Huber at 132-33 (read document into the record), attached as Tab 31, Pltfs.'Jt.Opp.Aff.

We believe that this document creates no dominant inference in either proving, or disproving, the existence of a conspiracy. First, Huber testified that he received this information from a customer. Deposition of John Huber at 134, attached as Tab

31, Pltfs.'Jt.Opp. Aff. Indeed, as may be expected, the price reduction spawned much discussion in the market. See, IMC Managers Report (MI 31528) ("PCS prices have dominated activity last week."); PCS Memorandum dated December 18, 1989 (PS 214568)(informing Smith of Kalium's, IMC's, and Cominco's likely reactions to price cut, gleaned from conversation with customer), attached as Exhibit 31, Defs.'Jt.Rep. Aff.

Second, it is not disputed that PCS sought to be the price leader in the industry, nor, as Brook has plainly established, is it unlawful for PCS to seek to stabilize the market, even if the effect would be to "forc[e] firms to maintain supracompetitive prices."[24] Brook Group v. Brown & Williamson Tobacco, supra at 224.

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[24] Thus, evidence that PCS viewed the Market Correction Program as the "2 X 4 approach" does not assist the Plaintiffs in establishing that the Program was intended to retaliate against those firms which departed from the alleged conspiracy. PCS Handwritten Strategy Memorandum undated (PC 292882-83), attached as Tab 2, Pltfs.'Jt. Opp.Aff. Rather, this document merely shows that the Program was implemented in furtherance of PCS's goal of being the price leader. The reference to the "2 X 4" approach is listed with "Raised Prices $35" and "Gave Rebates - Left Price up $18" under the heading "Re-examine Our Strategy -- Should We Be Bold Enough to Take Drastic Action Again?" Id. Notably, the Memorandum goes on to report that "prices continue to deteriorate." Id.

Likewise, we cannot draw a reasonable inference of conspiracy from a Noranda Memorandum that records a conversation between the author, who appears to be a Noranda employee, and an employee at PCS, which occurred at the Saskatchewan Mining Association, in February of 1990. Noranda Memorandum (NOR 167913), attached as Tab 6, Pltfs.'Jt.Opp.Aff. Referring to this conversation, the Memorandum states:

> Casual conversation at the SMA meeting with a fairly senior PCS guy got quite pointed about the "market correction plan" and he was happy to indicate that they could do it again and to lower price levels because they were more efficient than the rest of us and didn't have to worry about the DOC at levels that would cause the other producers to "dump."

Third, it remains uncertain what conduct was referenced by the terms "cheating" and "chipping away." Although this language may allude to conduct which deviated from an unlawful conspiracy, it is equally reasonable to read the terms as referring to a general price deterioration, or to prices that were lower than those that were allowed under the Suspension Agreement. Moreover, it cannot be intelligibly ascertained who had been "cheating." See, e.g., Cominco Memorandum dated October 16, 1992 (CA 012468) ("Resellers will be trying to chip away at the above prices -- hopefully, the major producers will not allow this to happen."), attached as Tab 7, Plts.'Jt.Rep.Aff.

Lastly, the inference suggested by the Plaintiffs is further undermined by a contemporaneous IMC strategic plan document. PCS Strategic Plan (MI 45907), attached as Exhibit 31, Defs.'Jt. Rep.Aff. Dated December 27, 1989, the document addresses IMC's assessment of PCS's market behavior, in the following terms:

> We consider PCS's recent (December) market behavior to be a short-term aberration to their desired goals.
>
> * * *
>
> [IMC's] position will be to support PCS pricing efforts as long as their efforts are realistic. We will lead if PCS's approach is not in [IMC's] best interest.

On its face, this document reveals that IMC did not view the price reduction as a means by which PCS would retaliate against coconspirators so as to reestablish an agreed-upon

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In our view, this Memorandum is consistent with PCS's intent to use the Program as a means to stabilize market prices.

price. Given these starkly competing inferences, we conclude that premising a conspiracy upon the language contained in the Kalium document would allow impermissible surmise to supplant responsible factfinding.

viii. Transformation of Industry During 1987. In addition to "uncharacteristically parallel pricing behavior," the Plaintiffs advert to other developments in the potash industry, in early 1987, which, they claim, are probative of a conspiracy. These developments include a new emphasis upon list prices, the elimination of discounts, and industry-wide cutbacks.

As a preliminary observation, we cannot draw an inference of conspiracy from the Plaintiffs' assertion that "uncharacteristically parallel pricing" commenced in 1987. Pltfs.'Jt.Opp.Memo. at 11. As the Plaintiffs themselves have acknowledged, prices in an oligopoly tend to be uniform and, in fact, they have been uniform throughout the history of the potash industry. Although several attempted price hikes, in 1986, were later rescinded after industry participants failed to follow along, the mere fact that Canadian producers "raised prices and the increase struck," after the arrival of Childers and Doyle at PCS in the spring of 1987, proves nothing more than interdependence in an oligopolistic marketplace. Pltfs.Jt.Opp.Memo. at 1. While the amount of the increase, in September of 1987, was exceptional, by not providing the amount of the price increase in the Spring of 1987, the Plaintiffs ask that we infer a price fixing conspiracy based on the mere fact that prices increased. As we have repeatedly observed, however, such business behavior is insufficient to establish an agreement to fix prices.

The Plaintiffs' next claim that, "[b]y May of 1987, coincident with the arrival of Childers and Doyle at PCS, there emerged a new found industry-wide emphasis on list prices for potash." Pltfs.' Jt.Opp.Memo. at 12. To support this assertion, the Plaintiffs cite a passage from an article, that was

published in a trade publication, in which Doyle, who was the President of PCS Sales, is quoted as stating:

> "When I first came on board in the Spring of 1987, the first word I put out to our sales force was that the price list was our price, stick to that price and no bending. Anybody who bends was out of here," Doyle says.

"Tough Decisions Return Balance to the Bottom Line," Custom Applicator, Feb. 1989, attached as, Exhibit 24, Defs.'Jt.Memo.Aff.

However, the article continues by quoting Childers' explanation of a legitimate business reason for an emphasis upon price lists:

> "Our philosophy is that our customers are better off as long as they have a steady system where they can depend on one price and one price list," [Childers] says. "If we say the price is $122, then that's what it is going to be. Our customer needs to have confidence in us and our price list."

Id.

The fact that PCS's emphasis on list prices was predicated on a legitimate business purpose renders the probative weight of that practice, in proving the existence of a conspiracy, to be equivocal, at best.

The inference that the Canadian Defendants colluded, in part, by emphasizing price lists, is also subverted by the absence of evidence that the strategy was pursued by the other producers. Indeed, the only other evidence, that is proffered by the Plaintiffs, is a March of 1987 internal Memorandum from IMC, which lists, in part, the following objectives:

> Reduce the amount of the discount and the number of discounted buyers. Be more selective in who we sell placing less product in the hands of the re-seller. Restrict the number of re-sellers pulling out of IMC warehouses. Put pricing back in the hands of the producer. Eliminate large swings in price which permit the re-seller to buy large quantities of product prior to a planned price increase, permitting him to undersell and delay the price from moving up.

IMC Objectives Memorandum (MI 013536), attached as Tab 4, Pltfs.' Jt.Opp.Aff. [Emphasis Supplied in Plaintiffs' Brief]. Contrary to the Plaintiffs' pinched reading, we construe the highlighted language as more naturally meaning that IMC "put pricing back in the hands of the producer," not through the use of price lists, but by a reluctance to sell to "re-sellers." Moreover, an IMC interoffice Memorandum of December 3, 1991, supports the opposite inference -- that is, an overall disillusionment with price lists. In that Memorandum, Steve Hoffman ("Hoffman"), who was the Senior Vice President of Sales at IMC, observed: "Since the mid 1980's, domestic potash pricing has evolved from sacrosanct price lists to a total disregard for their credibility." Hoffman Memorandum (MI 48458), attached as Exhibit 31, Defs.'Jt.Rep.Aff. Thus, while the evidence suggests that PCS publicized its intention to not deviate from list prices, there is no evidence that the Defendants reached any understanding, by which each agreed to adhere to list prices so long as their competitors did. Indeed, the evidence favors the opposite inference.

Further, we conclude that the Plaintiffs' assertion that, in the Spring of 1987, the Defendants "coordinated the elimination of long-standing discount practices," likewise suffers from a dearth of evidentiary support. Pltfs.'Jt.Opp.Memo. at 12. For this proposition, the Plaintiffs reference a PCA interoffice Memorandum of July 8, 1987, from James Brown, who was employed in the Eastern Regional Office of PCA, to the Eastern District Managers.

Brown Memorandum (XC 000498), attached as Tab 5, Pltfs.'Jt.Opp.Aff. In this Memorandum, Brown advises that PCA's senior management had made clear that discounts, which had been given for prompt payment, would only be given for payment that was received within the stated time period. Referring to this policy, Brown states: "It is our intent and obviously the industry's practice henceforth to exercise this procedure firmly and it is up to each of us to make sure our customers clearly understand this procedure." In our view, Brown's Memorandum reveals nothing more than a recognition of the pricing policies of PCA's competitors and, therefore, this evidence is ambivalent.

Equally nonprobative of any agreement, among the Defendants, to abolish long-standing discount practices, is the Plaintiffs' reliance upon a Noranda Memorandum of June 5, 1987. This Memorandum reports that, with the exception of "summerfill incentive discounts," PCS will no longer permit discounts, "however general consensus that there may be some form of a National Discount." The Memorandum also reports that neither IMC nor Cominco had specified national discounts, although they "may surface later in some form." Noranda Memorandum (NOR 118422), attached as Tab 6, Pltfs.'Jt.Opp. Aff. While the document suggests that PCS, under the new management of Childers and Doyle, had unilaterally reduced the number of available discounts, it does not reasonably support an inference that the Defendants illegally coordinated the elimination of any well-established discount practice.

As a further aspect of what the Plaintiffs have regarded as a transformation in the potash industry, they assert that the "spring of 1987 brought industry-wide production cut-backs." Pltfs.'Jt. Opp.Memo. at 13. To support this suggestion, the Plaintiffs have referenced a Memorandum from George Jones to John Gordon, both of whom were Vice-Presidents at Noranda, which discusses the background market conditions which led to Noranda's financial problems. Noranda

Memorandum (NOR 438284-87), attached as Tab 6, Pltfs.'Jt. Opp.Aff. The Plaintiffs have quoted the following passage:

> The losses by producers and the planned cutbacks by Cominco, Saskatoon, IMC, the 50 percent operating rate of PCS, curtailed operations at Kalium and the potential closure at [Noranda] would all combine to indicate the possibility for price stability.

However, any inference, that may have otherwise arisen from this document, is substantively eviscerated by the fact that the document should, correctly, be dated "November 17, 1986," and not "November 17, 1987," as the Plaintiffs' had understood. Noranda Memorandum (NOR 438284-87), attached as Tab 6, Pltfs.'Jt.Opp.Aff. Accordingly, the document verifies that the Canadian producers, aware of the oversupply problems in the industry, had begun to limit production well in advance of the date that the Plaintiffs have alleged as being the start of the purported conspiracy.

To be sure, as the Plaintiffs have asserted, production "shutdowns continued in later years." Pltfs.'Jt.Opp.Memo. at 14. As but one example, the Plaintiffs direct us to a Cominco Report, of potash operations, in June of 1989. In relevant part, the Report advises:

> The entire industry is taking extended summer shutdowns to get inventories to an acceptable level, and we must do the same. We have scheduled a 6-week shutdown this summer. Politically, we cannot be seen to be taking less stringent measures to stabilize prices and inventories than our Saskatchewan competitors.

Cominco Memorandum (CA 265270), attached as Tab 7, Pltfs.'Jt. Op.Aff.

In our view, rather than support an inference of unlawful complicity, the quoted segment reveals Cominco's intent to follow the market. In any event, the decision to reduce production is precisely the type of conduct that routinely is influenced by independent self-interest. In addition to the proper business interests of reducing supply, the production shutdowns had the added effect of staying governmental intervention in the marketplace, as the same Report recounts: "The government has not proceeded with establishment of the production review board or regulations having stated they are satisfied with how the industry is maintaining discipline." Id.

In bolstering their claim, that the Defendants unlawfully agreed to cutback production, the Plaintiffs quote the following passage from a 1993 Report, that was disseminated by the Mineral Policy Sector of Energy Mines and Resources Canada:

> Over the last four years, operating rates in the Canadian potash industry declined to average 60% of total installed capacity. Since 1987, Canadian producers have been managing production in an attempt to stabilize world markets and prices; potash supply capability has been exceeding world demand for the last decade and is projected to continue to exceed it until the end of this decade.

Energy Mines and Resources Canada Report (CTX 1526), attached as Tab 9, Pltfs.'Jt.Opp.Aff.

Nonetheless, "[t]he fact that many, if not all, firms in an industry react similarly to a particular practice does not evidence an industry-wide agreement when there is a legitimate business purpose for each firm's behavior." Richards v. Neilsen Freight Lines, supra at 904. We conclude, therefore, that because the oversupply of potash was a legitimate business concern, each of the Defendants had a proper economic motive in reducing their production. Thus,

the Plaintiffs' evidence is of dubious weight since it denotes individual motivation as much as it evidences conspiratorial conduct.

Lastly, the Plaintiffs point to two internal Noranda Memoranda to support their contention that the "Spring of 1987 brought new recognition of industry unity." Pltfs.'Jt.Opp.Memo. at 20. On June 27, 1987, a Noranda internal weekly Report observed:

> Buyer sentiment towards the potential firmness in the potash market is mixed. The potash market has been a buyers market for so long that these buyers are resisting the discipline the producers collectively are attempting to enforce.

Noranda Report (NOR 407425), attached as Tab 6, Pltfs.'Jt.Opp.Aff. [Emphasis in Plaintiffs' Brief].

A subsequent internal weekly Report, that is dated July 24, 1987, expresses a similar view:

> The mood of the Southwestern Fertilizer Conference in Dallas was cautiously optimistic, mainly by reason of the generally uniform resolve of fertilizer Producers to take whatever pricing and supply action is necessary to be profitable during the next fertilizer year.

Noranda Report (NOR 408836), attached as Tab 6, Pltfs.'Jt.Opp.Aff. [Emphasis in Plaintiffs' Brief].

Once again, we find this evidence to be indeterminate. In our view, the documents show nothing more than some recognition, on Noranda's part, that the price increases were enduring.

Indeed, a similar recognition is reflected in contemporaneous issues of a weekly trade publication of the fertilizer industry, whose edition of June 15, 1987, reported as

follows: "The resolve on PCS's and IMC's parts to hold out for higher product dollars is firm." "Market Watch, North America, Potash," Green Markets, June 15, 1987 at 2, attached as Exhibit 21, Defs.'Jt.Rep.Aff. In an issue of July 27, 1987, the same publication advised: "Potash producers have convinced most buyers that they are firmly committed to current posted prices, at least for the next couple of months." "Market Watch, North America, Potash," Green Markets, June 15, 1987 at 2, attached as Exhibit 21, Defs.'Jt.Rep.Aff. Given the acknowledged interdependence of the firms within the potash industry, and the unrebutted testimony of the Noranda employees, that the information contained in the internal reports was derived from potash customers, we conclude that the mere use of the terms "collectively," and "uniform," to describe the events that were occurring in the marketplace, does not competently allow a reasonable inference of conspiracy. See, Deposition of David James Sandison at 77-78, Deposition of Julie Rawska-Cook at 134, attached as Exhibit 21, Defs'.Jt.Rep.Aff.

In the final analysis, we are compelled to conclude that the Plaintiffs have failed to proffer evidence which constructively distinguishes conduct, that could not or would not have occurred without advance communication or understanding, and that which is an ordinary incident of the marketplace. We do not suggest that this evidence is somehow irrelevant, however, as the Second Circuit has observed, in Apex Oil Co. v. DiMauro, supra at 254-55, as follows:

> A court deciding whether to grant summary judgment should not view each piece of evidence in a vacuum. Seemingly innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background against which the behavior takes place.

Accordingly, in determining those inferences that may be reasonably drawn from the Plaintiffs' showings, we have viewed, and will continue to consider, the Plaintiffs' evidence in the context of the Record as a whole.

d. Interfirm Communications. The third component of the evidence, which the Plaintiffs claim supports a reasonable inference of a conspiracy, consists of the communications between the various Defendants. According to the Plaintiffs, there existed a high level of interfirm communications which, when considered in conjunction with the Defendants' record of coinciding conduct, warrants an inference of conspiracy. For these purposes, we will follow the organization that the Plaintiffs have employed, and will group this evidence in the following categories: the cutoffs; the exchange of production information: the price discussions: the apologies; and the threats. Upon our close review, we conclude that these communications do not reliably confirm the Plaintiffs' allegations of conspiracy.

i. The Cutoffs. The Plaintiffs assert that, "among the most noteworthy communications," are those that relate to "cutoff dates." Pltfs.' Jt.Opp.Memo. at 16. The Record demonstrates that the Defendants have frequently announced future potash prices, and the dates when those prices were to take effect. According to the Plaintiffs, "the Defendants would follow up on price increase announcements with personal communications to make sure all competitors would adhere to the new price on the effective date and refrain from selling at the old price after the 'cutoff date.'"[25] Id. Upon

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[25] Robert Turner ("Turner"), who was the Vice-President of Sales at Kalium, described cutoffs, as they related to price changes, in the following terms:

> There are generally four price periods in the fertilizer year. * * * One would be summer fill program, then you have the fall use period, then you have a winter fill program and a spring use period. Generally the prices in the fill programs are

close review, however, this grouping of communications generally relates to one producer -- PCS -- complaining about a certain business practice of another producer -- Kalium.

In response to this contention, the Defendants have cited the Seventh Circuit's decision, in Valley Liquors, Inc. v. Renfield Importers, Ltd., supra at 661, and have asserted that the proof of complaints by competitors is an inadequate foundation to support a conspiracy claim. In contrast to this case, however, Valley Liquors, as well as Monsanto Co. v. Spray-Rite Service Corp., supra, which is the case that was principally relied upon in Valley Liquors, involved allegations of an unlawful vertical agreement.[26] In Monsanto, the Supreme Court held that a conspiracy cannot be established merely by proof that a manufacturer terminated a distributor in response to dealer complaints. According to the Court, complaints about price cutters "are natural -- and from the manufacturer's perspective, unavoidable -- reactions by distributors to the activities of their rivals." Id. at 763.

Despite the fact that Monsanto and Valley Liquor involved vertical agreements, rather than the type of

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> lower than prices in the use periods. So if we put our a price list for the summer fill program that is due to cut off on September 15, by means of the price list we say that product that is ordered and shipped after September 15 will go at a higher price. Our distribution system occasionally gets swamped and is unable to deliver all of the orders by September 15. So to make certain that our customers are protected on their price, if they have accepted orders in by the cutoff date, prior to the cutoff date, we sometimes have to ship beyond the cutoff date.

Deposition of Robert Turner at 25-26, attached as Tab 52, Pltfs.' Jt.Opp.Aff.; see also, Deposition of Clifford Kelly at 242-43 (stating reasons why list prices usually increased during the growing season), attached as Exhibit C, Kal.Rep.Aff.

[26] In contradistinction to horizontal agreements, or agreements between competitors at the same level in market structure, a vertical agreement exists between firms at different levels of the market structure, such as between manufacturers and distributors.

horizontal conspiracy alleged here, we conclude that the analysis of these Courts is generally instructive. In rejecting the notion that a Jury could infer the existence of a price-fixing agreement from the complaints of other distributors, the Monsanto Court made clear that, so long as the manufacturer made an independent business decision not to do business with a distributor, the fact that the manufacturer was aware of the other distributors' complaints was of no moment. Complaints alone, the Court observed, do not "tend[] to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." Id. at 764. In so concluding, the Court, in Monsanto, recognized that complaints between members of different market layers are often "unavoidable," and may even assure a more efficient distribution system. Id. While complaints between competitors at the same market level may not always have the same potential to improve the market, we do not believe that evidence of such complaints, standing alone, satisfies the Plaintiffs' burden in establishing a conspiracy. Since the focus of our inquiry is directed at whether two or more of the Defendants unlawfully agreed to fix prices, we find no responsible basis, nor any persuasive authority, upon which to conclude that such complaints should be accepted, without more, as indicia of a conspiracy, in order to discourage, or to remove such conduct, from the horizontal marketplace. We, therefore, turn to the complaints, and the responses they received.

On November 5, 1990, Turner, who was the Vice President of Sales at Kalium, met with Doyle and Smith, both of PCS. According to Turner's notations from that meeting: "They wanted to talk about our post-increase shipments[;] [c]auses problems with effective date of increases."[27]

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[27] While not cited in the Plaintiffs' Memoranda, the Record indicates that, in July of 1989, Doyle telephoned Turner to express his displeasure at Kalium's practice of shipping product, after a price cutoff, at pre-cutoff prices. Deposition of Robert Turner at 107, attached as Pltfs.'Jt.Opp.Aff.;

Deposition of Robert Turner at 107, attached as Tab 52, Pltfs.'Jt.Opp.Aff. Of note, Turner's daybook entry reveals that he had advised Doyle and Smith that he was meeting them out of courtesy, that he did not feel that meeting with competitors really solved anything, and that he "would not discuss any pricing related items with them." Id. at 109; Turner Daybook Entry (AK 005698), attached as Tab 3, Pltfs.'Jt.Opp.Aff. Regarding the post-cutoff discussion, Turner "just saw it as a continuation of [Doyle's] line of bitching about that." Deposition of Robert Turner at 110-11, attached as Tab 52, Pltfs.'Jt.Opp.Aff. Indeed, Doyle has testified that shipping product at fill season prices, after a use season price increase, was "a constant practice at Kalium." Deposition of William Doyle at 297, attached as Tab J, Kal.Rep.Aff. Thereafter, in August of 1991, Doyle again expressed his "displeasure" to Turner, that "Kalium continued to ship beyond a cutoff date." Deposition of Robert Turner at 36, attached as Tab 52, Pltfs.'Jt.Opp.Aff.; Summary of Competitor Communications at 14-15, attached as Tab 1, Pltfs.'Jt.Opp.Aff. Although Doyle did not ask Kalium to stop the practice, he stated that PCS's information and studies "showed that Kalium's market share increased in the months following a cutoff date." Id. Significantly, Turner testified that he responded as follows:

> I repeated what I had told him on the prior occasion * * * that our distribution system at times became overwhelmed and we could — couldn't make the cutoffs as we would like to do but that was our system and that we would work to protect the business that we had and if we had to extend, we would. We would run our business.

Summary of Competitor Communications at 12, attached as Tab 1, Pltfs.'Jt.Opp.Aff. We have also considered the import of this communication in the analysis that proceeds in the text of this Report.

Deposition of Robert Turner at 37, attached as Tab 52, Pltfs.'Jt. Opp.Aff.

Undoubtedly, if one first were to assume the existence of a conspiracy, PCS's complaints and inquiries, concerning Kalium's cutoff shipments, would appear to be consistent with communications between conspirators. However, as Matsushita explains, the Plaintiffs are required to supply evidence which tends to establish the conspiracy, and the Plaintiffs may not discharge their burden by simply assuming that a conspiracy was at play, and then force-fitting every scintilla of evidence into that assumption. Here, the cutoff evidence does not dispose toward the establishment of a conspiracy, because the evidence does not tend to exclude the equally probable inference of independent action and, indeed, we find the evidence to be more supportive of independent action. Not only does the contemporaneous record disclose Turner informing Doyle of Kalium's competitive intentions, but there is also no evidence that Doyle requested Turner to stop the post-cutoff shipments at pre-cutoff prices. Deposition of Robert Turner at 26 ("I can't recall that he demanded that we stop doing that."), attached as Tab 52, Pltfs.'Jt.Opp.Aff. More importantly, the Plaintiffs make no attempt to contradict the evidence that Kalium did not change its conduct in response to PCS's protests. Deposition of William Doyle at 326, attached as Tab J, Kal.Rep.Aff.; Deposition of Robert Turner at 272-73, attached as Tab E, Kal.Rep. Aff.[28]

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[28] The enforcement of cutoffs, the Plaintiffs assert, also prevented potash resellers from accumulating potash inventories, prior to a price increase, for resale after the increase went into effect. In this respect, the Plaintiffs proffer a PCS internal Memorandum of March 9, 1989, which, at first blush, appears to support their view:

> We must get control back in the hands of the producers. * * * We must control inventories, to not beef-up at any specific locations, at the request of the operator/customer or sales manager in anticipation of a block sale. It is important that we

The Plaintiffs next assert that Turner recognized the "importance of adhering to the previously announced price rises." Pltfs.'Jt.Opp.Memo. at 17. To support this assertion, the Plaintiffs reference a December 16, 1991 entry in Turner's daybook which reads, as follows:

> Bill Doyle called. Wanted to advise they were not going along with the Gromark program. Said Gromark had advised that we were. He said he was advised that IMC and Cominco were declining as well. I told him that we had agreed to be competitive at Gromark. We also fully intended to get the product out by 1/31 and to read my letter to the trade. I reminded him that the Gromark program was in response to reseller deliveries after cutoff and was directed to protect themselves from that.

Deposition of Robert Turner at 136, attached as Tab 52, Pltfs.'Jt. Opp.Aff.; Turner Daybook Entry (AK 006067), attached as Tab 3, Pltfs.'Jt.Opp.Aff.

In our view, this entry more plausibly supports an inference of independent action than of concerted effort.

> get the word out on block sales. * * * We need to set a policy or at least send some indicator as to our thinking.

PCS Memorandum (PC 024187), attached as Tab 2, Pltfs.'Jt.Opp.Aff.

This evidence is indeterminate, however, for it shows nothing more than PCS's frustration over the conduct of potash wholesalers which impeded PCS's ability to sell product after a price increase. Further, the fact that Turner expressed a similar concern to Gillette, on January 15, 1992, is not probative of a conspiracy. See, Deposition of Robert Turner at 142 ("I also told him I was concerned about reseller activity after 1/31 at old prices."), attached as Pltfs.'Jt.Opp.Aff. Absent some showing that the content of these communications supports a reasonable inference of a conspiracy, a discussion between rivals, of a common marketing concern, cannot singularly suffice to exclude the real possibility that the competitors were acting, individually, in their own, respective, self interests.

The "letter to the trade," to which Turner adverted, was a cover letter that Kalium had attached to its price list of December 2, 1991, and that had been transmitted to its customers. In that letter, Kalium informed its customers that it "intend[ed] to complete all winter fill requirements on or before January 31, 1992." Kalium Letter to Customers (AK 101545), attached as Exhibit 23, Defs.'Jt.Rep.Aff. Thus, Turner conveyed no information to Doyle that had not already been made public. What is perhaps more significant, however, is that, rather than "recognize the importance of adhering to a price increase," Turner not only informed Doyle that Kalium would be competitive, but confirmed that Kalium had satisfied Gromark's request, and had sold its potash at its lower, fill-season price. Deposition of Robert Turner at 262-63, attached as Tab E, Kal.Rep.Aff.[29]

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[29] Likewise, evidence that, on December 19, 1991, Turner told Bo Thompson ("Thompson"), who was a representative of Potocan, which is a non-Defendant potash producer, that Kalium intended to have all of its deliveries completed by 1/31, is non-probative. Not only is Potocan not a Defendant in this action, but Kalium's intent to have deliveries completed by 1/31 had previously been expressed in a letter to its customers. Deposition of Robert Turner at 138, attached as Tab 52, Pltfs.'Jt.Opp.Aff. Further, we find Turner's statement to Steve Gillette, who was the Manager of National Accounts at PCS, that Kalium intended to "make our cutoff date * * * with only a few mechanical exceptions," and that Kalium did not intend to "deviate from my letter to customers on the price list," to be equally non-probative. Id. at 142.

Lastly, while the vast majority of the Plaintiffs' "cut-off" evidence involves PCS and Kalium, PCA's Ripperger recalled one instance when Doyle asked him if PCA intended to implement a price increase that PCA had announced, and "that [PCA] not make sales at the old price after the effective date of the announced price increase." deposition of John Ripperger at 216, attached as Tab 43, Pltfs.'Jt.Opp.Aff. Although Ripperger could not recall either the date of the conversation, or his specific response, he believed PCA "did what we wanted to do as far as running our business." Id. at 218. The Plaintiffs have pointed to no evidence to the contrary. Although we do not condone such conduct, absent evidence that either Kalium or PCA modified their behavior, we

ii. The Exchange of Production Information. In support of a conspiratorial inference, the Plaintiffs next contend that the Defendants "regularly exchanged detailed information about each other's future production." Pltfs.'Jt.Opp.Memo. at 18. When examined closely, however, the Plaintiffs' evidence reflects no more than innocent conduct.

The first piece of evidence, that is offered to support the Plaintiffs' assertion, is a Memorandum of September 15, 1992, which was authored by C.S. MacKay ("MacKay"), who was the officer at Kalium in charge of production, and which was directed to John Huber ("Huber"), who became the President of Kalium in 1991. Kalium Memorandum (AK 008221), attached as Tab 3, Pltfs.'Jt.Opp.Aff. This Memorandum recounts a meeting, on September 9, 1992, of the International Fertilizer Association ("IFA") Potash Working Party. Along with MacKay, representatives from PCS, IMC, the Canadian government, and four non-Canadian producers were in attendance. The Memorandum reveals that various producers, including IMC and PCS, disclosed production information. When viewed in context, however, the producers disclosed their production plans for 1992 and, because the parties did not report the amount of potash that each had already produced in 1992, the disclosures did not reveal how much more potash each intended to produce. Even if the producers had provided this information, it is not clear what use this information had on the alleged fixing of prices. Given the fact that more non-Defendants provided production information than did the Defendants, and that the information which IMC and PCS provided was solely limited to their 1992 production figures, we conclude that this Memorandum is insufficient to favor an inference of a conspiracy.

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conclude that Doyle 's remarks are inadequate, by themselves, to support the inference of a collusive agreement.

The Plaintiffs next point to a Kalium Memorandum of January 8, 1993, in which MacKay reports a Saskatchewan Mining Association ("SMA") "State of the Nation" meeting. Kalium Memorandum (AK 108967), attached as Tab 3, Pltfs.'Jt.Opp.Aff. At these meetings, "each company reviews specific items such as safety, union problems or employee problems and it also includes future plans for shutdowns." Deposition of John Huber at 61, attached as Tab 31, Pltfs.'Jt.Opp.Aff. However, with respect to the information concerning future shutdowns, Huber testified that the producers disclosed only what each had publicly disclosed, id. at 62, and, according to Huber, the applicable union contracts required the producers to provide their employees with advance notice of mine shutdowns. Id. at 57. Any inference of conspiracy, that could be based upon the Defendants' participation at SMA meetings, is further mollified by the fact that the producers disclosed this information prior to the commencement of the alleged conspiracy.[30]

Although not cited in the Plaintiffs' briefs, the final piece of evidence that they offer, to demonstrate regular exchanges of sensitive information, is a January 20, 1993 entry from Turner's daybook. The entry reveals that William Ayers ("Ayers"), who was the Director of International Sales and Marketing at PCA, told Turner that "their production was at

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[30] As additional evidence that the Defendants had disclosed sensitive material regarding their production capacity, the Plaintiffs cite a Kalium Memorandum in which MacKay recounts the events at a dinner meeting of the Saskatchewan Potash Producers Association. According to the Memorandum, MacKay attended the meeting to talk with representatives of the Canadian Government. Kalium Memorandum (AK 616130), attached as Tab 3, Pltfs.'Jt. Opp.Aff. Notwithstanding the Plaintiffs' claim, that the Defendants exchanged information "which would have been closely guarded secrets between true competitors," Pltfs.'IMC Memo. at 7, the date of the Memorandum was February 18, 1986, which predates the alleged conspiracy by over a year and, therefore, related to a period of time that the Plaintiffs cite as one of intense competition within the potash industry.

desired levels but extreme cold was causing salt to precipitate and was impacting production." Deposition of Robert Turner at 225, attached as Tab 52, Pltfs.'Jt.Opp.Aff. Not only did Ayers fail to indicate any future production information, but this kind of communication between firms, concerning general production information, would seem to be a natural expression of legitimate business interests, which simply does not support an inference of a conspiracy to fix prices.

iii. Price Discussions. In this category of evidence, the Plaintiffs have assembled those price communications which they have not otherwise identified as pertaining to cutoffs, to threats, or to apologies. The bulk of these communications involve instances in which a representative of one of the Defendants attempted to verify an assertion, by a customer, that he had purchased potash, in a completed transaction, from another producer and at a particular price.

> The Plaintiffs contend that the exchange of pricing information supplies significant evidence of a conspiracy. We note, however, that the cases upon which the Plaintiffs rely involved systematic and routine exchanges of pricing information. Thus, in Morton Salt Co. v. United States, 235 F.2d 573, 575 (10th Cir. 1956), the presence of a "completely free exchange of pricing information," between the alleged conspirators, was not disputed. In that case, "[p]ricing information, keys and scales were sent to one another and any changes which were of interest to the other salt producers were communicated immediately." Id. Likewise, in Rosefielde v. Falcon Jet Corp., 701 F. Supp. 1053, 1057 (D.N.J. 1988), the defendants' sales representatives "engaged in a regular exchange of price and other information." The exchanges routinely occurred during monthly telephone conversations, and included the product's base price at the "next available delivery."

In contrast to the cases cited by the Plaintiffs, not only does the verification evidence here relate to completed transactions, but the evidence demonstrates that the contacts were neither coordinated nor systematic. See, Summary of Competitor Communications, attached as Tab 1, Pltfs.'Jt.Opp.Aff. Notwithstanding the Plaintiffs' bald assertion that the Defendants "discussed prices at every opportunity," the Record reveals no more than several dozen instances, during the period between April of 1987, through March of 1995, in which one Defendant requested another to verify the sale price of a past transaction. Pltfs.'Jt.Opp.Memo. at 37. Further, the vast majority of the contacts involved PCS.

As to PCS, the evidence reveals that it either initiated or received verification contacts, which ranged from less than a dozen per year with IMC, to no more than one or two during the entire period with Noranda. Summary of Competitor Communications, attached as Tab 1, Pltfs.'Jt.Opp.Aff. Moreover, contrary to the Plaintiffs' assertion, the evidence suggests that the Defendants were not always candid with each other and, at times, they refused to disclose the requested information. See, Deposition of Gary Snyder at 129 (responses "probably not" truthful), attached as Tab 48, Pltfs.' Jt.Opp.Aff; Deposition of Jerry Jackson at 220 (noting that Turner at Kalium told him that he was "not comfortable" verifying a certain price), attached as Tab 32, Pltfs.'Jt.Opp.Aff.

Of course, "the dissemination of price information is not itself a per se violation of the Sherman Act." United States v. Citizens & Southern National Bank, 422 U.S. 86, 113 (1975); accord, Rosebrough Monument Co. v. Memorial Park Cemetery, 666 F.2d 1130, 1137 n. 4 (8th Cir. 1981); see also, VI Areeda, §1422b at 134 ("[A] firm asking a rival for its price on a particular item or transaction and announcing an intention to match it may simply be articulating the obvious:

[and a] traditional agreement cannot be inferred.")[31] Because the mere exchange of price information, without more, is not unlawful, the Plaintiffs must demonstrate that the price verifications were motivated by an anticompetitive intent and,

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[31] Although not cited by the Plaintiffs, independent research as drawn our attention to United States v. Container Corp., 393 U.S. 333 (1969), which, upon a first reading, gave us pause. There, under circumstances which bear a similarity to those before us, the Supreme Court concluded that the conduct of price verifications, within a concentrated industry, could give rise to liability, under Section 1 of the Sherman Act, even in the absence of an illegal agreement. In a concurring opinion, Justice Fortes took pains to assure that the decision would not be read as holding that the exchange of price information, even in an oligopoly, should be treated as a per se violation of the Sherman Act. Id. at 339.

Consistent with the Plaintiffs' approach, the Defendants also have not addressed the ruling of the Court in Container Corp., but have tacitly addressed that ruling by addressing a prior decision of the Court that Container Corp. left intact. See, Cement Manufacturers Protective Association v United States, 268 U.S. 588 (1925)(recognizing the validity of exchanging pricing information so as to curtail arguably fraudulent client practices). Further, the Defendants have pointedly relied upon the Supreme Court's subsequent holdings, in United States v. United States Gypsum Co., 438 U.S. 422, 441 n. 16 (1978), and United States v. Citizens & Southern National Bank, 422 U.S. 86, 113 (1975), which implicitly adopted Justice Fortas' concurrence as the governing law.

We are satisfied that, even if the price verification activities of the Defendants were as systemic and pervasive as those suggested in Container Corp., that decision has no continuing viability. Whatever vestiges of Container Corp. remained after the Court's subsequent decisions, in Citizens and Gypsum, would surely be eradicated by the Court's pronouncements in Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984), and in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). Where, as here, sporadic price verifications have occurred, but were generated by the legitimate business purpose of assuring that a customer was not misleading a producer, as to the market value of potash, the circumstance of the price verification is ambiguous evidence of price fixing. Accordingly, the cases which we cite in the text of this Opinion are, in our view, reflective of the prevailing weight of authority.

indeed, caused injury to competition. Rosebrough Monument Co. v. Memorial Park Cemetery, supra at 1138.

Here, by contrast, the evidence does not reasonably support the inference that the disclosure of past transaction prices was undertaken with the purpose and effect of facilitating a greater coordination and stabilization of prices. In the two instances, that were cited by the Plaintiff, as involving a response by a Defendant to a specific price confirmation discussion, the Defendant actually lowered its price. Deposition of Charles S. Hoffman at 133, attached as Tab 16, Pltfs.'Jt.Opp.Aff., cited in Summary of Competitor Communications at 7, attached as Tab 1, Pltfs.'Jt.Opp.Aff. As to intent, the unrebutted evidence supports an inference that the Defendants made, and answered inquiries regarding past transactions, in order to ascertain the accuracy of their customers' assertions. See, Wilcox v. First Interstate Bank of Oregon, N.A., 815 F.2d 522, 527 (9th Cir. 1987) ("An exchange of price information which constitutes reasonable business behavior is not an illegal agreement."). We find nothing inherently unusual, or sinister, in a sporadic request being made to a business competitor, in order to determine if a customer's report, of a competitive sales price, was truthful.

Having concluded that the Plaintiffs' price verification evidence does not tend to exclude the possibility that the Defendants were acting independently, we turn to those price discussions which, the Plaintiffs assert, did not involve a price confirmation.

1. The NMP/Eddy Memoranda. In support of their assertion, that the Defendants developed a network "to exchange advance information about price increases," the Plaintiffs cite an internal NMP/Eddy Potash Memorandum dated October 27, 1988. Pltfs.'Jt.Opp.Memo. at 19; NMP/Eddy Memorandum (MN 001511), attached as Tab 8, Pltfs.Jt.Opp.Aff. The Memorandum states that, with respect to a recently scheduled Kalium price increase, "PCS and IMC have indicated they do not expect to change current prices

before December 1." Id. The Plaintiffs infer that Pat Tubbs ("Tubbs"), who authored the Memorandum, and who was an NMP salesperson, had obtained the information from conspiratorial discussions with representatives of PCS and IMC. We conclude, however, that this inference is speculative because the Memorandum does not disclose the means by which Tubbs secured the information. Indeed, the Memorandum plainly reveals, on its face, that Tubbs had obtained the Kalium price list -- a portion of which was affixed to the document -- from a customer. Id. Moreover, Dean McWilliams, who was the only witness who testified about the Memorandum, stated that the source of the information, that was contained in the document, was a customer. Deposition of Dean McWilliams at 84, attached as Exhibit 24, Defs.'Jt.Rep.Aff.

For the same reason, we find the remaining documents, that are cited in the Plaintiffs' Memorandum in opposition to NMP/Eddy's Supplemental Memorandum, to be hopelessly ambiguous. For example, the Plaintiffs have referred to an internal Memorandum of January 30, 1992, in which Marshall observes that: "The primary Potash producers are making strong statements in regard to the February 1st price increase which is stated to be $7.00 according to the published list prices." Not only is Marshall's reference to "strong statements" unclear, there is nothing in the Record to support an inference that Marshall learned of these "statements" from his rivals. NMP/Eddy Memorandum (MN 003549), attached as Tab 8, Pltfs.Jt.Opp.Aff. The Plaintiffs' attempt to brace this asserted inference, by citing a Memorandum of February 1, 1992, which was authored by McWilliams, and which stated that NMP/Eddy "will support prices effective February 1, 1992 as published in December," is equally unavailing. NMP/Eddy Memorandum (MN 003549), attached as Tab 8, Pltfs.Jt.Opp.Aff. In fact, McWilliams testified that his intent was to report that NMP/Eddy was "going to make every effort

to hold our price schedule." Deposition of Dean McWilliams at 116, attached as Exhibit 5, NMP/Eddy Jt.Rep.Aff.[32]

2. Jackson (PCS) -- Benusa (Cominco). Next, the Plaintiffs identify a meeting at which David Benusa ("Benusa"), who was a Regional Sales Manager at Cominco, asked Jackson to confirm a discounted price, that PCS had used in a sale to Crop Production Services ("CPS"), a subsidiary of Cominco. Deposition of Jerry Jackson at 63, attached as Tab 32, Pltfs.'Jt.Opp.Aff. According to Jackson, on behalf of Cominco's accounting department, Benusa wanted to know why CPS received a $6 discount. Id. at 68. Jackson testified that he informed Benusa that the discount constituted a "competitive national discount," which PCS had maintained with CPS prior to CPS's acquisition by Cominco. Id. at 65. According to the Plaintiffs, "[i]t defies all logic to believe this clandestine meeting was simply an effort to get information that the accounting people could have gotten from a simple call." Pltfs.'Com.Memo. at 4-5. Of course, whether the information requested by Benusa could be simply obtained from another source is as conjectural as the Plaintiffs' inference that Jackson and Benusa met for a conspiratorial purpose when there is an equally valid business reason to explain their encounter; namely, whether a subsidiary of Cominco was being properly charged for potash and whether that charge reflected a new price reverberation in the marketplace to which Cominco, and the other potash producers, might have to competitively respond. More

[32] The Plaintiffs citation to an additional Memorandum, which was authored by Marshall, and dated December 3, 1992, is equally non-probative. The Memorandum, which has price lists from IMC and PCS appended to it, stated: "PCS is not increasing prices until Feb. 1, 1993." NMP/Eddy Memorandum (001525), attached as Tab 8, Pltfs.Jt.Opp.Aff. Once again, however, the manner in which Marshall obtained the information contained in the Memorandum is entirely unclear and, by every appearance, PCS's stated intent -- not to raise its prices until February 1 -- was intimated on the face of its price list.

importantly, there is no showing that Benusa sought any alteration in the discount given, or otherwise acted upon the information that Jackson disclosed.

3. Hoffman/Wittje (IMC) -- Benusa (Cominco). The Plaintiffs have also isolated an expense report of Steve Hoffman ("Hoffman"), who was the Senior Vice President of Sales at IMC, which records that he, Herman Wittje, who was also of IMC, and Benusa, played golf on July 8, 1992. Hoffman Expense Report (MI 103147), attached as Tab 4, Pltfs.'Jt.Opp.Aff. The report advises that the purpose of the outing was to discuss IMC's potash exchange with Cominco and Canpotex. Id. According to Hoffman, IMC and Cominco had a detailed potash exchange that involved multiple warehouse locations. Deposition of Steve Hoffman at 194-97, attached as Tab 29, Pltfs.'Jt.Opp.Aff. Once a year, representatives from each company would determine valid locations for the exchange, and would agree on what had to be accomplished with any outstanding balances. Hoffman testified that the outing was planned for this purpose, and he denied that there was any discussion of potash pricing in the United States. Id. at 197-98.

In support of a purported conspiratorial purpose behind the golf outing, the Plaintiffs have directed us to an internal Cominco Memorandum, which was also dated July 8, 1992, in which Benusa states: "Our competitors have agreed to deduct $2.00 from their current warehouse and rail delivered list." Pltfs.'Com.Memo. at 7, quoting Cominco Memorandum (CA 012296), attached as Tab 7, Pltfs.'Jt.Opp.Aff.[33]

[33] Unfortunately, we are unable to locate this document. Nevertheless, portions of the document's contents have been quoted in the Plaintiffs' Cominco Opposition Memorandum, during Hoffman's Deposition, and during the Summary Judgment Hearing. We have no cause to doubt the reliability of the contents there quoted. See, Pltfs.'Com. Memo. at 7; Deposition of Steve Hoffman at 195, attached as Tab 29, Pltfs.'Jt.Opp.Aff.; Transcript of Summary Judgment Hearing at 269.

Notwithstanding Hoffman's testimony, the Plaintiffs infer, from the timing of the golf game, and of Benusa's Memorandum, that the information recited in Benusa's Memorandum was derived from conversations that were conducted on the golf course. However, absent any evidence as to who Benusa was referring to as the "competitors" or whether the price deduction was published before the golf outing, the inferences, that the Plaintiffs would have us draw, from the coincidence of the dates involved, cannot rise above pure conjecture.

4. Zalac (Noranda) -- Conforti (IMC). In an internal Noranda Memorandum of November 29, 1989, Mike Zalac reports that he was "[a]dvised by Bill Conforti, IMC today that PCS published following prices." Noranda Memorandum (NOR 140117), attached as Tab 6, Pltfs.'Jt.Opp.Aff. The Memorandum concludes by stating that "IMC will be publishing same prices." Id. Although Conforti disclosed IMC's intent to match PCS's published prices, the unrebutted testimony of David Westlake ("Westlake"), from Noranda, confirms that the information, which pertained to IMC's pricing intentions, had previously been distributed in the marketplace. Deposition of David Westlake at 198-99, attached as Tab 5, Noranda's Supplemental Reply Memorandum, Affidavit of Michael Kelly ("Nor.Rep.Aff."). Westlake testified that, prior to his receipt of the Memorandum, he had learned of IMC's plan to match PCS's price in a conversation that he had with a customer. Id. at 206-09: Westlake Diary (NOR 481182), attached as Tab 5, Nor.Rep.Aff. This evidence offsets any intimation that Conforti had provided Zalac with pricing information as a part of some alleged conspiracy. Further undermining any conspiratorial inference is the fact that Zalac's responsibilities, at Noranda, did not include sales or pricing but, rather, involved transportation matters. Deposition of David Westlake at 45, attached as Tab 5, Nor.Rep.Aff.

5. Turner/Huber (Kalium) -- Ripperger (PCA). The Plaintiffs next underscore Ripperger's testimony that Turner once remarked, during a telephone conversation which took place in the 1990's that, "by going directly to customers," PCA was "messing up the market" in the Minnesota/Wisconsin region. Deposition of John Ripperger at 226, attached as Tab 43, Pltfs.'Jt.Opp.Aff. Turner has admitted that he was frustrated by the fact that a PCA salesman was "aggressively cutting the price," and that he asked Ripperger if he knew what his salesman was doing. Deposition of Robert Turner at 51, attached as Tab 52, Pltfs.'Jt.Opp.Aff.

Despite Turner's frustration as to a particular pricing policy at PCA, we find this evidence to be equally consistent with independent conduct. Notably, there is no evidence that Turner, or Huber, who was the President of Kalium, had asked PCA to discontinue any particular sales practice. Deposition of John Ripperger at 227, attached as Tab 43, Pltfs.'Jt.Opp.Aff. While Ripperger responded that he would "check and get back" to Turner, the Record reveals that "[h]e never did, and the prices in Wisconsin continued to fall." Deposition of Robert Turner at 53, attached as Tab 52, Pltfs.'Jt.Opp.Aff. Corroboratively, Turner has testified that Ripperger did not provide any information about PCA's sales activities. Id. at 282, attached as Tab E, Kal.Rep.Aff. We are not impressed that any inference, founded upon this exchange, could be other than vague innuendo.

iv. Apologies Between Rivals. As a further aspect of its proffered evidence of interfirm communications, the Plaintiffs contend that "the Defendants politely apologized to each other for price competition." Pltfs.'Jt.Opp.Memo. at 20. Notwithstanding this characterization, we find that the proffered evidence is too slender to bear a reasonable inference of complicity.

On January 15, 1992, Steve Gillette, who was PCS's Manager of National Accounts, informed Turner that a

particular bid, to a customer in the Pacific Northwest, had been a mistake. According to Gillette, Turner had "said something to the effect of what the heck happened on this Agra Northwest bid." Deposition of Steve Gillette at 151, attached as Tab 25, Pltfs.'Jt.Opp.Aff. Gillette explained that "people had been away for the holidays," and that a "misquotation had been made that was below common trading in the market." Id. Gillette testified to his concern that Sam Clark ("Clark"), who Turner supervised, had "come unglued." Id. at 152. Turner informed Gillette that "even though costly, [Kalium] had protected [its] business at that location." Deposition of Robert Turner at 142, attached as Tab 52, Pltfs.'Jt.Opp.Aff.

In December of 1992, Gillette encountered Clark at a Far West Fertilizer Conference. According to Gillette, Clark still appeared "miffed about what had happened in that respective bid." Deposition of Steve Gillette at 117, attached as Tab 25, Pltfs.'Jt.Opp. Aff. Gillette reiterated that a mistake had been made in the price quotation, and he further acknowledged that PCS had subsequently changed its organizational structure. Id. at 118. "The other thing that I did say to him, that I was going to pursue the market competitively every day and I had no intent of having a special price for bid business or two-tiered pricing in that geography." Id. Gillette recalls Turner advising that the bid price was particularly disruptive in the marketplace, but that Kalium did what they had to do, which was to match the price quotation. Id. at 119.

We believe that this single transaction, by itself, creates no permissible inference. The Record demonstrates that Gillette sought to assuage certain representatives of Kalium, who were upset at having to match a price that was "below the perceived market price." Id. at 119. Given the competing inferences and, particularly, the uncontroverted evidence that the objectionable price was a mistake, we find that Gillette's remarks do not tend to preclude the possibility of independent

action and, in this instance, the end result was increased, rather than diminished, competition.

v. Threats. Lastly, the Plaintiffs assert that, when prices eroded in 1989, the "price communications became accusatory." Pltfs.'Jt.Opp.Memo. at 21. Since the bulk of this evidence does not involve instances in which one Defendant demanded another Defendant to behave in a certain manner, or risk peril, we conclude that, contrary to the Plaintiffs' characterization, this evidence more properly amounts to a collection of complaints. As we have already indicated, the mere fact that one Defendant has complained to another is ambiguous, since each of the specific complaints would appear to have an equally plausible, non-conspiratorial explanation. We turn to this evidence, following the Plaintiffs order of presentation.

1. Childers (PCS) -- Proops and Sullivan (Kalium). In July of 1988, Childers visited Jay Proops ("Proops"), who, along with Joe Sullivan ("Sullivan"), had acquired Kalium from PPG in November of 1987. According to Proops, Childers told him that PCS was losing its market share, and that several other producers, including Kalium, were gaining market share. Deposition of Jay Proops at 17, attached as Tab 41, Pltfs.'Jt.Opp.Memo. Childers further advised Proops that he had documentation to show that Kalium was "undercutting PCS's prices in the marketplace," and that such pricing "was one of the causes of the problem." Id. at 18. At the end of the meeting, Childers handed Proops a PCS Memorandum of June 16, 1988, which was authored by Jackson and directed to Doyle, and which was entitled: "Competitive Activity spring 1988: IMC, Kalium and Cominco." In relevant part, the Memorandum reads:

> Kalium's history throughout the spring season has been non-supportive. The information provided will show Kalium has consistently been $6.00--$8.00/ton below PCS pricing through the spring season. * * *

> Freight has been a game Kalium has played throughout the spring season serving to reduce delivered market pricing. * * * Kalium's attitude in the marketplace has shown aggression and a lack of willingness to support Canadian list pricing. Even though Kalium has acted with less finesse than IMC and has clearly been a negative, their impact on the general market has not been as destructive as IMC.

PCS Spring Competitive Analysis - Redacted (AK 057713A-B), attached as Tab 3, Pltfs'.Jt.Opp.Aff.[34]

Thereafter, Proops undertook a study in order to determine whether the specific prices, that were reflected in that document, were correct. Deposition of Jay Proops at 37, attached as Tab 41, Pltfs.'Jt.Opp.Memo. While the Plaintiffs assert that Proops commenced this investigation so as to reassure himself that Kalium "had not been competing," Pltfs.'Jt. Opp.Memo. at 22, Proops has testified to the contrary. When asked what he was "looking to find out," Proops stated that it was his understanding that Kalium's position in the marketplace was "to sell a premium product at a premium price." Deposition of Jay Proops at 34, attached as Tab 41, Pltfs.'Jt.Opp.Memo. If the pricing allegations were

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[34] Proops' testimony reveals that the document he received from Childers did not include the analysis of IMC and Cominco, which had been included in the original Memorandum. Deposition of Jay Proops at 46-47, attached as Tab 41, Pltfs.'Jt.Opp.Memo. We note that the original version, in addition to separate analyses of Cominco and IMC, also included the following summary:

> PCS's May market share performance is a direct result of low priced selling from our chief competitors, IMC and Kalium. Market developments took several forms ranging from broker based activity to freight manipulation. The fact remains that IMC and Kalium have not come close to supporting the list price.

PCS Spring Competitive Analysis -- Non-Redacted (PC 074283-85), attached as Tab 2, Pltfs.'Jt.Opp.Memo.

true, "it would have been different from my understanding of our own policy." Id. at 32.

While we are troubled by Childers' conduct, we again note that the focus of the antitrust laws is concerted action. Here, the evidence shows that Proops was "upset" with Childers' visit, and that he had expressed his concern to Sullivan. Id. at 30; Deposition of Joe Sullivan, attached as Tab 50, Pltfs.'Jt.Opp.Aff. This concern is reinforced by the fact that Proops notified Kalium's legal counsel shortly after that meeting. In addition, Proops testified that he did not show the referenced document to anyone, other than Kalium's attorney and Sullivan, and that he did not discuss the results of the study with anyone other than Sullivan. See, Declaration of Jay Proops at ¶ 3, attached as Tab M, Kal.Memo.Aff. Further, the Record does not demonstrate that Childers asked Proops to modify Kalium's behavior, let alone that Proops agreed to change Kalium's pricing policies, or even that he told Childers what Kalium's practice was with respect to its pricing policies. Deposition of Jay Proops at 18-22 and 29, attached as Tab 41, Pltfs.'Jt.Opp.Memo.

When viewed in totality, we find that Childers' visit, although perhaps injudicious, was insufficient, as a matter of law, to raise a genuine issue of fact. First, the content of this informal complaint does not suggest that Childers accused Kalium of deviating from agreed upon conduct but, rather, merely voices PCS's concern that Kalium's aggressive pricing policies had taken a portion of PCS's market share. Second, the Plaintiffs have identified nothing in the Record that even remotely suggests that Childers' visit had any effect on Kalium's pricing decisions. See, Declaration of Jay Proops at ¶ 3 , attached as Tab M, Kal.Memo.Aff.; Deposition of Joe Sullivan at 172-73, attached as Tab G, Kal.Rep.Aff. Indeed, at least in PCS's view, Kalium continued to aggressively pursue a larger market share. In a PCS Memorandum of

November 18, 1988,[35] in which Jackson follows up on the Memorandum of June, that Childers gave to Proops, Jackson

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[35] The November 18, 1988 follow-up Memorandum is significant in that it not only supports Kalium's claim, that its pricing did not change after Childers' visit, but it also suggests aggressive competition on the part of IMC, Cominco, and Noranda. In this regard, the Memorandum states:

> IMC has set the standard for market share since the beginning of the 1988 calendar year. * * * Market share strides have resulted once again from freight manipulation, below market pricing and low prices selling through third parties (brokers). Third party selling has produced the greatest market share gains for IMC.
>
> * * *
>
> Cominco has missed very few opportunities to sell aggressively. * * * Although menacing, market aggression by Cominco was much less frequent and certainly not as wide spread as IMC and Kalium.
>
> * * *
>
> Noranda through Terra showed absolutely no support for market pricing. As the fall market weakened Terra managed to remain $2.00 to $4.00/S.T. below competitive levels.
>
> * * *
>
> PCS' chief competitors, IMC and Kalium, simply took advantage of PCS market discipline. * * * The lack of competitor discipline has had a snow-balling effect on market share. IMC and Kalium have noticeable market share increases as a result of the lack of support for market pricing.

PCS Competitive Market Analysis (PC 171624), attached as Exhibit 30, Defs.'Jt.Rep.Aff.

On December 13, 1988, Jackson summarized PCS's year from a market share perspective. The analysis was included in a Memorandum directed to Doyle, which concluded with the following language:

> When assessing the market share situation, it is clear that PCS losses this year result from competitor's low market selling, freight manipulation and terms in special situations. PCS has been very disciplined and has refused to sell under the above circumstances. Our chief competitors IMC, Kalium and

states: "While PCS supported strong June/July pricing and strict guidelines for national accounts, Kalium priced product aggressively, forward-sold material, and appeared liberal with national discounts." PCS Competitive Market Analysis (PC 171624), attached as Exhibit 30, Defs.'Jt.Rep.Aff. Thus, there is no causative relationship from which a reasonable inference of conspiracy may reliably be drawn. The Plaintiffs apparently ask us to infer, from Childers' comments, that he would not have approached Proops in the absence of a prior understanding. Given Proops' testimony, that he did not solicit the analysis, that he communicated no agreement, that he immediately contacted Kalium's counsel, and that Kalium's post-visit persistence in aggressively pricing its product, this inference is less compelling than the competing inference that Childers acted, independently, on the chance that he might receive a favorable response, which he did not.

Thereafter, on August 16, 1990, Childers made an attempt to discuss pricing with Sullivan. His attempt has been

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Cominco have taken the "whatever it takes to get the business" selling approach.

PCS 1988 Business Loss Analysis (PC 171619), attached as Exhibit 31, Defs.'Jt.Rep.Aff.

In our view, the market analyses performed by PCS not only fail to support the Plaintiffs' alleged conspiracy, but they strengthen the Defendants' contention that their pricing activities were not concerted.

Lastly, the portrayal of Cominco's aggressive selling undermines the Plaintiffs' assertion that Cominco participated as a "teamplayer" in the conspiracy. Pltfs.'Com.Memo. at 7. To support this assertion, the Plaintiffs have pointed to the following statements in the PCS June Competitive Analysis Memorandum: "Very little of the information we have points to problems generated by Cominco. In a few instances Cominco was found to be below the market but their general behavior pointed to responsible selling." PCS Spring Competitive Analysis -- Non-Redacted (PC 074283-85), attached as Tab 2, Pltfs.'Jt.Opp.Aff. Even without the follow-up market analyses, however, we conclude that PCS's use of the term "responsible selling" is nothing more than its unilateral characterization of price-following behavior.

memorialized in a Memorandum that Sullivan drafted. See, Sullivan Memorandum (AK 058790), attached as Tab 3, Pltfs.'Jt.Opp.Aff. The Memorandum reads, in part, as follows:

> Childers than turned to a second issue, stating that his pricing leadership was not working despite major efforts. He immediately said that he would like to discuss this issue with me, taking advantage of my long experience in industry leadership. He indicated he had been by to see me two years ago, but that was during the time that I was in the hospital * * *. I told him that, as much as I respected him, that we could not talk about pricing at all because even the appearance of this might be misconstrued by the Department of Justice, or other governmental bodies. I further pointed out that Jay [Proops] and I had decided, right from the start, never to engage in this kind of discussion. Childers responded that he wouldn't even suggest anything illegal in such a discussion.
>
> I responded that, even if it were totally innocent, several years down the line it might appear illegal. I again reiterated that I was not trying to be difficult or unfair, but we will just not discuss pricing at all. Childers than backed off and said he would not discuss it with us given our views.

Immediately after the conversation, the Record reflects that Sullivan consulted with Kalium's legal counsel and "alerted Kelly not to discuss anything remotely concerning price with Childers, feeling that this was a very dangerous situation." Id. What is most significant about this conversation, however, is that an attempt to discuss pricing was explicitly, and abjectly, rebuffed by Sullivan; thus an inference of concerted action is

not justifiably supported. Viewed in conjunction with Childers' visit in June of 1988, Sullivan's conversation with Childers suggests that, at most, Childers sought an understanding with Kalium that it would be in each producer's best interests if prices were set and maintained. However, even if that had been Childers' intent, the Plaintiffs have identified no evidence, in the Record before us, that even remotely suggests Childers reached any "unity of purpose or a common design and understanding." American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946).

2. Doyle (PCS)/Williams (IMC) -- Ripperger (PCA). During his deposition, Ripperger recalled being approached by representatives of three potash producers -- Doyle from PCS, Williams from IMC, and an individual from Dead Sea Works -- concerning PCA's sale of Russian Potash. Deposition of John Ripperger at 204-11, attached as Tab 43, Pltfs.'Jt.Opp.Aff. These communications occurred during a meeting of the Fertilizer Institute ("TFI") in 1987, or in 1988. Each of these individuals informed Ripperger that PCA's pricing activity, in Florida, was "undermining the prevailing level of prices for potash," or was otherwise "having a negative impact on the market." Id. at 204 and 209. In view of Ripperger's testimony, that he perceived his communications with Doyle and Williams as annoyances, rather than threats, and that, despite these conversations, PCA continued to sell Russian potash at whatever price it felt was necessary, we find this evidence non-suggestive of any alleged conspiracy. Id. at 209-210 (annoyance); Id. at 253 (no change in behavior), attached as Tab A, Rio Algom/PCA Rep.Aff.

3. Doyle (PCS) -- Huber (Kalium). During a meeting, in 1991, of the Phosphate and Potash Institute ("PPI"), Doyle complained that Kalium's market share had increased and PCS's had declined over a period of time. Deposition of John Huber at 250, attached as Tab 31, Pltfs.'Jt.Opp.Aff. In response, Huber advised that Kalium was

enjoying increased intercompany sales, and good industrial sales. Id. at 251. This evidence proves nothing.

Doyle then expressed unhappiness about PCS's drop in market share with Occidental Chemical, which was a customer of both Kalium and PCS. Doyle told Huber that "he wasn't going to kick us [i.e., PCS] out," and indeed, PCS matched Kalium's lower price to maintain business. Deposition of William Doyle at 275-76, attached as Tab 22, Pltfs.'Jt.Opp.Aff. In turn, Huber testified that he considered Doyle's comments as "trash talk," and that Doyle was unhappy and frustrated that Kalium's market share had risen. Deposition of John Huber at 254, attached as Tab 31, Pltfs.'Jt.Opp.Aff. Moreover, since Kalium had previously signed a long-term contract with Occidental, Doyle's complaints could not, as a matter of logic, have had any effect upon Kalium's pricing. Further delimiting any reasonably plausible inference of a conspiracy is the fact that, once Doyle began commenting on Kalium's aggressive pricing with respect to a specific customer, Huber told Doyle the meeting was over, and he promptly left. Id. at 251.

4. Doyle (PCS) -- Turner (Kalium). On January 12, 1993, Doyle telephoned Turner to verify reports of Kalium offering "terms" in certain locations. Deposition of Robert Turner at 152, attached as Pltfs.'Jt.Opp.Aff. According to Turner's notations of the conversation, Doyle "admonished me that [PCS] did not and would not give terms." Id. In reply, Turner advised that Kalium had met a competitive situation, but would not disclose the identity of the customer. Id. With respect to terms, Turner replied that Kalium would "protect [its] business." Id. In light of Turner's responses, we find that, rather than demonstrate concerted action, this exchange fully supports an inference of independent action.

5. Snyder (PCS) -- Ayers (PCA). A PCA Memorandum of February 4, 1993, records a conversation between William Ayers ("Ayers"), who was PCA's Director

of International Sales and Marketing, and Gary Snyder ("Snyder"), who was PCS's Account Manager. PCA Memorandum (XC 120955), attached as Tab 5, Pltfs.' Jt.Opp.Aff. During that conversation, Snyder asked Ayers why he had offered a certain price to a specific customer which, in Snyder's view, was well below the market in that area. The Memorandum notes that Ayers replied that it was none of Snyder's business. In turn, Snyder told Ayers that PCS "will take it (prices) down and bury you (PCA) if that's what you want." Id. According to the Memorandum, Ayers recognized that Snyder was intoxicated, and he suggested to Snyder that his comments were inappropriate. Id.

At the outset, we note that this appears to be the only instance in this Record where one Defendant "threatened" another. Nevertheless, we do not believe that this conversation supports a reasonable inference of concerted action. Ayers testified that he did not perceive Snyder's remark as a threat but, instead, he sensed that Snyder was inebriated and "just mad they lost that business." Deposition of William Ayers at 83, attached as Exhibit 26, Defs.'Rep.Aff. Significantly, the evidence before us is undisputed, that the PCA employee rebuffed the complaint, and reported the incident to his supervisor. While we do not view threats, even if "idle," to reflect an exemplary business practice, we must examine the threat, in context, before we can reasonably infer a conspiracy from its existence. We find no legitimate basis to infer, on this Record, that a solitary threat, which was effectively rebuffed, reliably supports an inference of conspiracy.

6. Jackson (PCS) -- Ripperger (PCA). On February 18, 1993, Jackson asked Ripperger if PCA was selling at a certain price, and if PCA was following "the announced price increases." PCA Memorandum (XC 120954), attached as Tab 5, Pltfs.'Jt.Opp.Aff. In response, Ripperger refused to comment, and stated that it was not in their best interests to discuss the matter. Ripperger also stated

that PCA was "competitive with prices we find in our various markets." Id. We find no basis upon which to conclude that this evidence supports an alleged conspiracy.

7. Zimmerman (Cominco) -- Ripperger PCA. On February 22, 1993, Ben Zimmerman, who was a District Manager at Cominco, telephoned Ayers, at PCA, to determine whether PCA was selling potash at a certain price in a particular market. PCA Memorandum (XC 120959), attached as Tab 5, Pltfs.'Jt.Opp.Aff. Ayers refused to comment, to which Zimmerman replied that he thought he would attempt to determine what was happening from the marketplace. We find this evidence wholly non-probative of any allegedly illegal conduct.

8. Cominco Unwillingness to Trade Potash With PCA. The Plaintiffs next reference a Cominco internal Memorandum of February 22, 1993, as further evidence of a "threat." Although this Memorandum confirms a willingness, on the part of Cominco, to initiate a potash exchange with PCA, the Plaintiffs highlight that portion of the document which states that, "[d]ue to their weak approach to pricing, I am not prepared to offer them other locations at this time." Cominco Internal Memorandum (CA 009838), attached as Tab 7, Pltfs.'Jt.Opp. Aff. The Plaintiffs urge that Cominco's refusal to engage in additional trades with PCA is evidence of retaliation, or punishment. Pltfs.'Jt. Opp.Memo. at 23-24. In our view, the Memorandum is ambiguous, for it is wholly unclear what the author intended by referring to PCA's "weak approach to pricing." While such language could imply a conspiratorial effort to coerce PCA to raise its prices, it could equally mean that Cominco was not interested in permitting PCA to sell Cominco-derived potash at below market prices -- an undeniably cogent business reason for Cominco, independently, to reject any contemplated potash exchange.

e. Internal Memoranda Evidence. While not labeled a plus factor, the Plaintiffs identify several internal Memoranda, which were obtained from the various

Defendants, and which, the Plaintiffs claim, support a conspiratorial inference. Upon closer examination, however, we find that the Memoranda reflect nothing more than mere interdependence.

i. Cominco. The Plaintiffs cite several occasions on which a Cominco employee expressed the importance of "supporting" a particular price increase. For example, on February 17, 1992, Benusa recommended that Cominco publish a new price list, that would be effective on February 15. The Plaintiffs' maintain that the statement that, "[w]e have support from the coop system and I believe other majors are prepared to support this pricing structure," reveals a conspiratorial inference. Cominco Memorandum (CA 010350), attached as Tab 7, Pltfs.'Jt.Opp.Aff. We are not so persuaded. There is no evidence that Cominco communicated with any other Defendant concerning the February 15 price increase. Indeed, Benusa testified that the information, which pertained to the other potash producers, was obtained from a customer. Deposition of David Benusa at 78, attached as Tab 16, Pltfs.'Jt.Opp.Aff. Likewise, we find the Plaintiffs' evidence that Cominco decided, on several occasions, to "support" a particular price increase, reflects nothing more than its recognition that a price-following policy was, at least as of that date, in its best interest. See, Cominco E-mail, dated September 5, 1991 (CA 309789) ("need to make sure we are making every effort to support this price increase"); Cominco E-mail, dated October 16, 1992 (CA 012468) ("we have to support these levels without deviating"); Cominco Memorandum, dated January 25, 1994 (CA 004068) ("Our dealer network advised us that Kalium has announced a $8.00 per ton price increase on potash effective 2/14/94[;] * * * [i]t appears that we will support this increase but will wait a couple of days before we announce."), attached as Tab 7, Pltfs.'Jt.Opp.Aff.

In addition, the Plaintiffs assert that Cominco's central role in the alleged conspiracy is demonstrated by Benusa's

statements, in an internal memorandum of January 29, 1990, that Cominco "intend [s] to be a stabilizing rather a disruptive force," and that to "approach the market in any other way would be economically and politically unwise." Pltfs.'Com.Memo. at 6-7; Cominco Memorandum (CA 013758), attached as Tab 7, Pltfs.'Jt.Opp.Aff. [Emphasis Added in the Plaintiffs' briefing]. By emphasizing the term "politically" in their written arguments, the Plaintiffs appear to claim that Benusa used that term to reference Cominco's conduct in relation to the alleged co-conspirators. When the Memorandum is read in context, however, the term "politically" takes on its literal meaning, and most probably refers to Governmental actors. For example, the Memorandum advises:

> Given our current supply situation and our relationship with other buyers in the market place (i.e. CF) we should not * * * accept returns that may put us in violation of the suspension agreement. * * * I can assure you that we have no intention of violating the spirit of the agreement.

Id.

Moreover, the Plaintiffs suggestion of a conspiratorial meaning is further undercut by the fact that, positioned between the quoted statements concerning Cominco's stated intent to be "stabilizing," Benusa wrote: "We will be a player in the market based on service, quality and price to the extent that we can." Id. A fair reading of this statement, in conjunction with the entirety of the Memorandum's contents, logically implies the absence of an illegal agreement -- not the presence of one.

ii. PCA. As suggestive evidence of PCA's participation in the alleged conspiracy, the Plaintiffs have isolated a statement, which was recited in a PCA internal Memorandum of October 25, 1989, and which relates that a particular pricing program "may have some effect on moving

product and stabilizing market." PCA Memorandum (XC 119822), attached as Tab 5, Pltfs.'Jt.Opp.Aff. The program is specific to a particular "pricing problem at Baltimore since late May." Id. Despite the Plaintiffs' urging to the opposite effect, we draw no conspiratorial inference from this Memorandum. The reference to "stabilizing" is ambiguous, at best, since the term is plainly susceptible to multiple meanings. Here, the Memorandum appears to make clear that PCA intended to lower its prices, in order to sell more potash. We are unwilling to subscribe a conspiratorial inference to such a legitimate exercise of independent business judgment.

The Plaintiffs also rely upon a portion of a Monthly Report in November of 1992, which Robert Connochie, who was the President of PCA, sent to PCA's parent, Rio Algom, as evidencing that PCA acted contrary to its economic self-interest. The quoted portion states:

> In our effort to stabilize prices and maximize 1993 profit PCA has deliberately turned down business. As a result November volumes were minimal: December will be better but still below average.

PCA Monthly Report (XC 201661), attached as Tab 5, Pltfs.'Jt.Opp. Aff.

The Plaintiffs contend that PCA's decision not to maximize sales reflects economic irrationality. The Plaintiffs' reliance on this document is misplaced, however, as it demonstrates, on its very face, that PCA's intent was to "maximize 1993 profit."

iii. Noranda. In similar fashion, the Plaintiffs' contend that language in an internal Noranda Memorandum of June 27, 1987, which recommends that Noranda "support PCS's leadership role and announce to their [price] levels," is suggestive of a conspiracy. Noranda Memorandum (NOR 407467), attached as Tab 6, Pltfs.'Jt. Opp.Aff. We disagree. In our view, the Memorandum reveals no more than

independent price-following behavior. The author informs that she had advocated following PCS's published prices, as opposed to other producer's prices, because she believed that those producers would later revise their price lists. Id. Accordingly, we find ample evidence of interdependence to offset the Plaintiffs' implication of illegally concerted conduct.

f. Summary. In assessing the individualized components of the Plaintiffs' proffered evidence of price fixing, we have not lost sight of the greater picture for, in truth, the whole can be greater than the sum of its individual parts. Here, however, we have the totality of the Plaintiffs' evidentiary showings, but that composite view can claim no synergistic enhancement "from a number of acts none of which" tend to exclude the real possibility of independent action. Cal. Computer Products v. Intern. Business Machines, 613 F.2d 727, 746 (9th Cir. 1979): see also, American Floral Serv. v. Florists' Transworld Del., 633 F. Supp. 201, 215 n. 23 (N.D.Ill. 1986) ("[I]t requires no sophistication in mathematical theory to recognize that zero plus zero plus zero still equals zero[;] * * * [i]f no incident has probative value, all incidents taken together have no probative value."). While, perhaps, unduly simplistic, we believe it to be cryptically straightforward that, notwithstanding our thorough vetting of this Record for a showing which would comport with the rudiments of "Simon-says," we have found nothing more than "Follow-the-Leader."

Nor does the Plaintiffs' case obtain added substance from the expert opinion evidence of Rausser -- not because he is without the requisite background in economic theory, but because his opinions can be no more reliable than the factual underpinnings upon which they have been predicated. With modest exception, the mere passage of an untrustworthy evidentiary showing, through the mechanism of an expert's Report, will be wholly unavailing in curing the foundational deficiencies. See, Rule 703, Federal Rules of Evidence. In

voicing his opinions, Dr. Rausser has necessarily accepted, as reasonable, the ambiguous showings that Matsushita regards as nonprobative. We may not do likewise.

We understand the Plaintiffs' earnest belief that the conduct of the Defendants is, in their view, wholly consistent with their allegations of illegal price fixing. Unfortunately, while those allegations might properly elude a Motion to Dismiss, at this stage of the proceedings, the Plaintiffs may no longer rest on their allegations, for the Court must look, as we have, to the evidence before it in a light -- prismatically focused by the doctrine of Matsushita -- most favorable to them. See, Behrens v. Pelletier, --- U.S. ---, 116 S.Ct. 834, 840 (1996). Here, the result of that deliberative review commends an award of Summary Judgment to the Defendants.

B. The Separate Summary Judgment Motions of Individual Defendants.

While our Recommendation, if adopted, would have the effect of summarily concluding the Plaintiffs' claims, in the interests of completeness, we briefly address the Motions of Rio Algom and PPG for the entry of Summary Judgment on independent grounds.[36]

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[36] While the majority of the Plaintiffs' claims are timely, those claims, which arise more than four years before this action was commenced, require proof of fraudulent concealment if they are to remain viable. See, Title 15 U.S.C. §15b ("[a]ny action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action was accrued."). As the District Court has previously explained, "[t]he doctrine of fraudulent concealment requires plaintiffs to show (1) defendants concealed the conduct complained of and (2) despite the exercise of due diligence, plaintiffs failed to discover the facts that form the basis of their claim." In re Potash Antitrust Litigation, 159 F.R.D. 682, 698-99 (D. Minn. 1995). Nevertheless, since we have found that an inference of conspiracy is not reasonable, there cannot be a concealment of that which does not exist.

As we have noted, Rio Algom's involvement in the alleged conspiracy arose from its ownership of PCA. As a result, in order to hold Rio Algom liable, the Plaintiffs must either pierce the corporate veil between Rio Algom and PCA, or demonstrate that Rio Algom participated "as an actor," in the alleged conspiracy. H.J., Inc. v. International Tel. & Tel. Corp., 867 F.2d 1531, 1549 (8th Cir. 1989).

In support of their assertion, that Rio Algom is "legally responsible for the antitrust violations by PCA," the Plaintiffs highlight the language, in an internal PCA business strategy document, which is dated in August of 1990, and which states that "Rio Algom's March 30, 1990 strategy paper outlines several issues which form guidelines for PCA strategy." Pltfs.'Rio Algom/PCA Opp.Memo. at 5; PCA Memorandum (XC 03958), attached as Tab 5, Pltfs.'Jt.Opp.Aff. The Plaintiffs underscore that PCA supplied Rio Algom with monthly summaries of its operations, see, e.g., August 1990 Report (RIO 4124), attached as Tab 5. Pltfs.'Jt.Opp.Aff., and that Rio Algom representatives had participated in the merger negotiations between Kalium and PCA. Deposition of Robert Connochie at 170, attached as Tab 18, Pltfs.'Jt.Opp.Aff. As additional evidence to find Rio Algom liable, the Plaintiffs identify an internal PCA organizational chart which lists PCA as a "division" of Rio Algom. April, 1990 PCA Organizational Chart (XC 035579), attached as Tab 5, Pltfs.'Jt.Opp.Aff.

Nevertheless, in order to hold Rio Algom liable "as an actor," the Plaintiffs must demonstrate that Rio Algom "performed acts sufficient to create liability, or actively influenced [PCA] in its violations." H.J.. Inc. v. International Tel. & Tel. Corp., supra. In contrast, the Plaintiffs' evidence does not indicate that Rio Algom influenced any purportedly conspiratorial conduct. Indeed, the guidelines referred to in

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Accordingly, we do not reach the Defendants' Statute of Limitations defense.

the cited strategy document concerned the environment, new investment, professional development, and the volatility of earnings from mining investments. PCA Memorandum (XC 03958-61), attached as Tab 5, Pltfs.'Jt.Opp.Aff. As in H.J., which involved a claim of below-cost, predatory pricing, "there-[has been] no proof that [the Parent corporation] was involved in the decisions upon which liability is based." H.J., Inc. v. International Tel. & Tel. Corp., supra.

The Plaintiffs' claim, for piercing Rio Algom's corporate veil, is equally without merit. First, evidence that Rio Algom received monthly summaries from PCA, and that it participated in a merger discussion between PCA and Kalium, reveals nothing more than a normal parent-subsidiary relationship and, therefore, such conduct cannot, legitimately, constitute a basis for making Rio Algom responsible for PCA's independent, corporate actions. See, e.g., Lowell Staats Mining Co. v. Pioneer Uravan, Inc., 878 F.2d 1259, 1264 (10th Cir. 1989). Moreover, under these circumstances, a corporation's inaccurate description, of its relationship with a related corporation, cannot justify piercing the corporate veil. See, e.g., Fletcher v. Atex, Inc., 68 F.3d 1451, 1460 (2d Cir. 1995) (statements describing subsidiary as a division and as a business unit not evidence that the two companies operated as a "single corporate entity"). In sum, the Plaintiffs have failed to demonstrate "'the substantial reasons' necessary to disregard the presumption that a subsidiary is a legally separate entity from its parent." H.J., Inc. v. International Tel. & Tel. Corp., supra, quoting Contractors, Laborers, Teamsters & Engin. v. Hroch, 757 F.2d 184, 190 (8th Cir. 1985)(substantial reasons to justify veil piercing involve undercapitalization, failure to follow corporate formalities, intermingling of finances, promotion of fraud or illegality, and sham existence to shield liability); see also, Cooper v. Lakewood Engineering and Mfg. Co., 874 F. Supp. 947, 95556 (D. Minn. 1994) (similar factors cited under Minnesota law), aff'd, 45 F.3d 243 (8th Cir. 1995).

Accordingly, we find no basis to hold Rio Algom accountable, even if PCA had engaged in price complicity, as the Plaintiffs have alleged.

With respect to PPG, the defense of nonliability is premised upon its claim that it withdrew from the purported conspiracy when it sold Kalium, in November of 1987. Since the Plaintiffs did not file this action within four years of that date, PPG maintains that the Plaintiffs' claims are barred on Statute of Limitations grounds. We find this argument to have merit.

A conspiracy "is presumed to exist until there has been an affirmative showing that it has terminated, and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn." United States v. Edwards, 994 F.2d 417, 421 (8th Cir. 1993), cert. denied, 510 U.S. 1048 (1994), quoting United States v. Lewis, 759 F.2d 1316, 1343 (8th Cir. 1985), cert. denied 474 U.S. 994 (1985). Accordingly, "the statute of limitations does not begin to run on a co-conspirator until the final act in furtherance of the conspiracy has occurred or until a co-conspirator withdraws from the conspiracy." United States v. Reed, 980 F.2d 1568, 1584 (11th Cir. 1993), cert. denied, 509 U.S. 932 (1993).

In United States v. United States Gypsum Co., 438 U.S. 422, 464 (1978), the Supreme Court stated: "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment." While the mere cessation of activities may not be sufficient to activate the period of limitations, a conspirator "need not take action to stop, obstruct or interfere with the conspiracy in order to withdraw from it." United Sates v. Lowell, 649 F.2d 950, 957 (3rd Cir. 1981); see also, United States v. Granados, 962 F.2d 767, 773 (8th Cir. 1992) (citation omitted) (To withdraw from a conspiracy, a conspirator "must take affirmative action,

either making a clean breast to the authorities or communicating his withdrawal in a manner reasonably calculated to reach co-conspirators.").

Based upon the Record before us, we conclude that, by selling its interest in Kalium, PPG not only severed its connection with the potash industry, but it did so in a manner that was reasonably expected to adequately notify all of the alleged co-conspirators. The record reveals that the sale of Kalium, by PPG, was widely publicized in trade and financial publications, including Green Markets and the Wall Street Journal. Indeed, the unrebutted testimony of the salespersons, and of the executives, from all of the alleged co-conspirators, confirms their knowledge that PPG had sold Kalium. See, Portions of Deposition Testimony, attached as Exhibit 8, PPG's Memorandum in Support of Motion for Summary Judgment, Affidavit of Kathryn M. Walker ("PPG Memo.Aff.").

The Plaintiffs assertions to the contrary are not persuasive. First, the Plaintiffs argue that this Court's prior recommendation, that denied PPG's Motion to Dismiss, under Rule 12(b)(6), Federal Rules of Civil Procedure, controls our ruling on PPG's present Motion. of course, the argument is frivolous, at best, for it hopelessly ignores the core distinctions between the respective dispositive Motions. As the Supreme Court recently reiterated, Motions to Dismiss are directed to the sufficiency of the allegations in the Complaint, whereas, on Motions for Summary Judgment, the Court looks to the evidence before it. Behrens v. Pelletier, supra at 840. Moreover, the case upon which the Plaintiffs' rely, for the proposition that a sale of a business does not effect a withdrawal -- United States v. Sax, 39 F.3d 1380 (7th Cir. 1994) -- is distinguishable. Admittedly, the defendant in Sax sold his drug distribution business, but the evidence disclosed that the payment for that business was contingent upon future drug sales, and further, that he continued to receive proceeds from those drug sales. Id. at 1387. In contrast, it is

uncontroverted that PPG never sold potash, or received any financial benefit from the sale of potash, after the date that Kalium was sold. See, Affidavit of Aziz Giga at ¶¶ 4-5, attached to PPG Memo. Indeed, this case is more in line with our Court of Appeals decision in Krause v. Perryman, 827 F.d 346 (8th Cir. 1987). There, the Court concluded that, by producing unrebutted evidence that he had "sold all his stock and resigned as president of [the conspiring enterprise]," the defendant in a civil RICO case was entitled to Summary Judgment on the ground that he had effectively withdrawn from the conspiracy. Id. at 351. Therefore, we can find no basis, on the Record before us, to impute Kalium's involvement in the alleged conspiracy to PPG.

For these reasons, we recommend that Rio Algom's and PPG's Motions for Summary Judgment be granted, even if the Court should reject the Recommendation that Summary Judgment be granted in favor of all of the Defendants.

WHEREFORE, It is --

RECOMMENDED:

1. That the Motion of PCA and Rio Algom for Summary Judgment [Docket No. 512] be granted.
2. That Kalium's Motion for Summary Judgment [Docket No. 516] be granted.
3. That Noranda's Motion for Summary Judgment [Docket No. 519] be granted.
4. That Cominco's Motion for Summary Judgment [Docket No. 522] be granted.
5. That the Joint Motion of the Defendants for Summary Judgment [Docket No. 525] be granted.
6. That IMC's Motion for Summary Judgment [Docket No. 527] be granted.
7. That PPG's Motion for Summary Judgment [Docket No. 530] be granted.

8. That the Motion of New Mexico Potash and Eddy Potash for Summary Judgment [Docket No. 534] be granted.

/s/

Raymond L. Erickson
UNITED STATES MAGISTRATE JUDGE

NOTICE

Pursuant to Rule 6(a), Federal Rules of Civil Procedure, D. Minn. LR1.1(f), and D. Minn. LR72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties **by no later than September 30, 1996,** a writing which specifically identifies those portions of the Report to which objections are made and the bases of those objections. Failure to comply with this procedure shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

If the consideration of the objections requires a review of a transcript of a Hearing, then the party making the objections shall timely order and file a complete transcript of that Hearing by **no later than September 30, 1996,** unless all interested parties stipulate that the District Court is not required by Title 28 U.S.C. §636 to review the transcript in order to resolve all of the objections made.

APPENDIX A

LIST OF IDENTITIES

(Dates indicate beginning of tenure at position, if known.)

PCS/PCS Sales (PCS Sales Subsidiary)

Rolf Holzkaemper	President, PCS
Charles Childers	President, CEO, PCS, March, 1987
William Doyle	President, PCS Sales, March, 1987
Carlos Smith	Director of U.S. Sales, PCS Sales
Steve Gillette	National Accounts Manager, PCS Sales
Gary Snyder	Account Manager, PCS Sales
Jerry Jackson	Dir. of Natl. Accounts / Field Sales, PCS Sales

Kalium

Joseph Sullivan	Purchased Kalium in 1987, Chairman of Vigoro
Jay Proops	Purchased Kalium in 1987, Vice-Chair of Vigoro
Clifford Kelly	President, 1988
John Huber	President, 1991
Robert Turner	Vice President of Sales
C.S. MacKay	Officer Responsible for Production
Sam Clark	Sales Representative

IMC

Billie Turner	President, CEO
Christopher Williams	Senior vice President, Wholesale Marketing
Steve Hoffman	Senior Vice President, Sales
Richard Hedberg	Executive Vice President

Herman Wittje	Vice President, Marketing

NORANDA

William Deeks	President, CEO
John Gordon	Executive Vice President
George Jones	Executive Vice President
David Westlake	Unidentified
Mike Zalac	Responsible for Transportation Matters

PCA

Robert Connochie	President
William Ayers	Director of International Sales and Marketing
John Ripperger	Vice President Marketing and Sales
J.P. Welch	Western Regional Manager
James Brown	Eastern Regional Office

Cominco

John Anderson	President, CEO,
Dale Massie	Vice President, Marketing
David Benusa	Vice President, Regional Sales Manager
Ben Zimmerman	District Manager

New Mexico Potash/Eddy

Dean McWilliams	Exec. Vice President, 1988; President, 1992
Dick Marshall	Sales Representative, 1991
Pat Tubbs	Sales Representative

Rule 56. Summary Judgment

(a) **For Claimant**. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party**. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion**. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and

directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set fort specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits are Unavailable**. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith**. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including

reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Sherman Act, 15 U.S.C. § 1

Sec. 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(2)

No. 99-1844

Supreme Court, U.S.
FILED
JUN 16 2000
CLERK

In The

Supreme Court of the United States

HAHNAMAN ALBRECHT, INC., et al.,

Petitioners,

v.

POTASH CORPORATION OF SASKATCHEWAN, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICI CURIAE STATES OF ALABAMA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, HAWAII, IDAHO, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NEVADA, NORTH CAROLINA, NORTH DAKOTA, NORTHERN MARIANA ISLANDS, OHIO, PENNSYLVANIA, PUERTO RICO, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, VERMONT, AND WEST VIRGINIA, IN SUPPORT OF PETITIONERS

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Thomas Greene et al., *State Antitrust Law and Enforcement*, PRACTISING LAW INSTITUTE, 1117 PLI/ Corp. 957 (May-June 1999)..... 9

INTERESTS OF THE AMICI STATES

Under the rule adopted by the Eighth Circuit, antitrust suits alleging horizontal price-fixing will rarely survive the summary judgment stage if the suits are based on circumstantial evidence. Because most horizontal price-fixing cases must by necessity rely on such evidence, the consequence of that rule – which the Ninth Circuit has also adopted – is to create a virtually insurmountable barrier to the successful prosecution of one of the most pernicious forms of conduct covered by the antitrust laws. The thirty-four Amici States listed on the front cover have a compelling interest in reversing that incorrect holding, and in preserving the ability of antitrust plaintiffs and law enforcers to challenge horizontal price-fixing conspiracies.

The undersigned Attorneys General are the chief law enforcement officers of their states and are charged with the duty of enforcing the antitrust laws. They accomplish this in several ways. In their capacity as *parens patriae*, they are authorized to bring federal antitrust actions on behalf of citizens of their states.[1] As counsel for states, state agencies and political subdivisions, Attorneys General often file federal antitrust actions seeking damages and injunctive relief.[2] Further, Attorneys General are the

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[1] 15 U.S.C. § 15c (1998). *See Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945) (acknowledging the common law *parens patriae* authority of the States); *In re Toys "R" Us Litig.*, 191 F.R.D. 347 (E.D.N.Y. 2000); *and Florida et al. v. Nine West Group, Inc.*, No. 00 Civ. 1707 (S.D.N.Y. filed March 6, 2000).

[2] *See Georgia v. Evans*, 316 U.S. 159 (1942); *In re Ins. Antitrust Litig.*, 938 F.2d 919 (9th Cir. 1991), *aff'd in part, rev'd in part sub nom. Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

primary public enforcers of state antitrust laws, which are often interpreted in conformity with federal law.[3] The Amici States, through their Attorneys General, thus play a major role in antitrust enforcement and have a substantial interest in ensuring that federal antitrust laws are interpreted in accordance with sound antitrust policy and with this Court's prior decisions.

The ability to prosecute conspiracies that unreasonably restrain trade when only circumstantial evidence of conspiracy is available is of vital importance to the Attorneys General, particularly when such conspiracies are between competitors to fix prices. A law enforcer or plaintiff by necessity must generally rely on circumstantial evidence and the inferences that may be drawn from such evidence to prove an alleged conspiracy, as direct evidence of conspiracy is rarely available.[4] Under the Eighth Circuit's decision, however, plaintiffs and law enforcers would be rendered effectively unable to withstand summary judgment challenges so long as the proof consists solely of circumstantial evidence.

The issues involved in this case are of major importance to the preservation of free competition. For that

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[3] *See, e.g., Carl N. Swenson Co. v. E.C. Braun Co.*, 272 Cal. App. 2d 366, 77 Cal. Rep. 378, 379-80 (Cal. Ct. App. 1969); *State by Humphrey v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 894 (Minn. Ct. App. 1992), *aff'd*, 500 N.W.2d 788 (Minn. 1993); *X.L.O. Concrete Corp. v. Rivergate Corp.*, 83 N.Y.2d 513, 518 (N.Y. 1994); *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W.2d 1 (1966).

[4] *See, e.g., Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 720 (1965); *accord ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 553-54 (8th Cir. 1991).

reason, and those set forth below, the Amici States strongly urge this Court to grant the petition for certiorari.

REASONS FOR GRANTING THE WRIT

In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), this Court held that "if the factual context renders respondents' claim implausible – if the claim is one that simply makes no economic sense – respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." The Eighth Circuit, in a 6-5 *en banc* decision, has broadly extended *Matsushita* to cases in which the claims make obvious economic sense, namely, claims of horizontal price-fixing. In the case below, Petitioners alleged that a dramatic 48% increase in the price of granular grade potash, which was industry-wide and long enduring, was the result of a horizontal price-fixing agreement.[5] The Eighth Circuit drastically limited the inferences that can be drawn from circumstantial evidence in such horizontal price-fixing cases, essentially placing the burden on the plaintiffs to disprove – at the summary judgment stage – the defendants' proffered explanations for the circumstantial evidence. Pet. App. A-6 – A-19.

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[5] This percentage increase was calculated by comparing the September 1987 price of $58.00 per ton for granular grade potash to the January 1988 price of $86.00 per ton, although prices varied somewhat during the course of the alleged conspiracy. Pet. App. A-24.

As the dissent below stated: "Because conspirators cannot be relied upon either to confess or to preserve signed agreements memorializing their conspiracies, the court's requirement for direct evidence will substantially eliminate antitrust conspiracy as a ground for recovery in our circuit." Pet. App. A-20. The Eighth Circuit's opinion conflicts with thoughtful decisions of the Third, Sixth and Seventh Circuits, conflicts with the well established precedent of this Court, and limits the ability of state and federal regulators to enforce the antitrust laws effectively. For each of these reasons, certiorari should be granted.

ARGUMENT

I. THERE IS A WIDENING SPLIT IN THE CIRCUITS OVER THE PROPER SUMMARY JUDGMENT STANDARD TO BE APPLIED IN ANTITRUST CONSPIRACY CASES.

In *Matsushita*, this Court addressed the standards of proof necessary to survive a summary judgment motion in a case alleging violations of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1998). *Matsushita* is recognized as controlling precedent and cited extensively in antitrust cases in which the proof offered of an alleged conspiracy is circumstantial. However, the standards set forth in *Matsushita* have been interpreted in divergent ways among the circuits, resulting in conflicting opinions and an uneven application of the law.

Matsushita involved allegations of a predatory pricing scheme determined to be economically implausible.

In *Matsushita*, this Court acknowledged the well established principle that when considering a motion for summary judgment, the court must view all facts and inferences to be drawn from them in the light most favorable to the party opposing the motion.[6] This Court limited that well established principle by limiting the inferences a court may draw from ambiguous evidence in a case brought under Section 1. Emphasizing the importance of determining the economic plausibility of the plaintiff's theory in such a case, this Court cautioned:

> It follows from these settled principles that if the factual context renders respondents' claim implausible – if the claim is one that simply makes no economic sense – respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.

Matsushita, 475 U.S. at 587.

The case below involved allegations of horizontal price-fixing, a *per se* violation of the antitrust laws. Unlike the allegations of predatory pricing in *Matsushita*, the plaintiffs' theory in the case below – that defendants agreed to raise prices and keep prices high – made economic sense for the defendants. The Eighth Circuit, although professing to rely on the holding in *Matsushita*, failed to take into account the economic plausibility of the plaintiffs' theory when evaluating the circumstantial evidence presented. Rather it required that the evidence rise to the same level of proof as that required if the theory had been economically implausible.

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[6] *See Matsushita*, 475 U.S. at 588.

The Ninth Circuit took a similar stance in the recent case of *In re: Citric Acid Litig.*, 191 F.3d 1090, 1094-97 (9th Cir. 1999). That case, like the case below, involved allegations of horizontal price-fixing. Although the Ninth Circuit outlined what it considered to be the "two-part test" of *Matsushita*,[7] it failed to recognize the different evidentiary standards applicable only when the plaintiffs' claims are economically implausible.

In stark contrast to the Eighth and Ninth Circuits, the Third, Sixth, and Seventh Circuits, relying on the lessons of *Matsushita*, have taken into consideration the economic plausibility of the plaintiff's theory and recognized that the permissible range of inferences should be greatly restricted only if the theory is found to be economically implausible.[8] *See, e.g., Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1232-33 (3d Cir. 1993) (citing to *Matsushita* as requiring "sufficiently unambiguous" evidence to support inferences of a predatory

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[7] *In re: Citric Acid Litig.*, 191 F.3d at 1094.

[8] Arguably, the Ninth Circuit's decision in *In re: Citric Acid Litig.*, 191 F.3d 1090 (9th Cir. 1999) is inconsistent with its decision in *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 438-40 (9th Cir. 1990) (stating that *Matsushita* should not be read to permit a court to grant summary judgment for defendants whenever circumstantial evidence is equally consistent with both inferences of conspiracy and permissible conduct; rather, *Matsushita* merely limits the range of inferences that can be drawn from ambiguous evidence depending on the potential effects of such inferences on procompetitive behavior). The internal disarray, exemplified by these two Ninth Circuit decisions, in addition to the split between circuits on this issue, demonstrates the need for guidance by this Court.

pricing conspiracy when plaintiffs' theory was implausible and carried the risk of restricting highly procompetitive conduct (low prices)); *Ezzo's Invs., Inc. v. Royal Beauty Supply, Inc.*, 94 F.3d 1032, 1036 (6th Cir. 1996) (distinguishing the price-fixing allegation at bar from *Matsushita* by calling it the "classic anti-trust situation: an attempt to avoid a competitive marketplace by setting prices at an artificially high level"); *In re Brand Name Prescription Drugs Litig.*, 123 F.3d 599, 613-14 (7th Cir. 1997) (holding that summary judgment for defendant drug manufacturers and wholesalers was inappropriate where drug retailer plaintiffs' theory that defendants conspired to fix prices was plausible and supported by some evidence, although defendants offered innocent interpretations for the evidence), *cert. denied*, 522 U.S. 1153 (1998).

In *Petruzzi's*, the Third Circuit compared the difference in the plausibility of the claims in that case, which involved market allocation and bid rigging, with the predatory pricing claim in *Matsushita*. The claims in *Petruzzi's* made "perfect economic sense" and warranted "more liberal inferences from the evidence." *Petruzzi's*, 998 F.2d at 1232. The Third Circuit explicitly followed *Matsushita*, concluding:

> [T]wo important circumstances underlying the Court's decision in *Matsushita* were (1) that the plaintiffs' theory of conspiracy was implausible and (2) that permitting an inference of antitrust conspiracy in the circumstances 'would have the effect of deterring *significant* procompetitive conduct.' . . . Thus, the Court stated that the acceptable inferences which can be drawn from

> circumstantial evidence vary with the plausibility of the plaintiffs' theory and the dangers associated with such inferences.

Petruzzi's, 998 F.2d at 1232 (internal citation omitted) (emphasis added in original).

Although not uniformly recognized by the circuits, *Matsushita* clearly dictates that the range of permissible inferences that can be drawn from circumstantial evidence in antitrust conspiracy cases must differ according to the economic plausibility of the plaintiff's allegations. The greater the economic implausibility and the more likely that procompetitive conduct will be inhibited if liberal inferences of illegal activity are drawn, the stricter the scrutiny that must be given to the plaintiff's evidence. The failure of the Eighth and Ninth Circuits to conform to this precedent will result in the unwarranted increase of summary judgments, and rather than protecting procompetitive behavior, illegal anticompetitive behavior will go unpunished. *See Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 479 (1992). To ensure a level playing field for all litigants regardless of the circuit in which their case is filed, this Court should resolve the split in the circuits.

II. THIS ISSUE IS IMPORTANT BECAUSE THE SUMMARY JUDGMENT STANDARD SET BY THE EIGHTH AND NINTH CIRCUITS WILL UNDULY ELIMINATE VALID ANTITRUST CONSPIRACY CASES.

The determination of the proper summary judgment standard in conspiracy cases based on circumstantial evidence of conspiracy is extremely important. The very nature of a conspiracy is to be clandestine. Thus, law

enforcers or injured parties usually must rely on circumstantial evidence – and the reasonable inferences that can be drawn from such evidence – to establish the existence of a conspiracy. If an antitrust plaintiff cannot rely on circumstantial evidence of the alleged conspiracy (and concomitant reasonable inferences) to carry the plaintiff beyond the summary judgment stage in every case where a defendant can articulate a possible non-conspiratorial explanation for its conduct, such conspiracies will rarely be successfully challenged or prosecuted. Obviously, any defendant aware of the antitrust laws will try to disguise activity that violates these laws as legal conduct to the greatest extent possible. Consequently, a rule that substantially eliminates the utility of circumstantial evidence would significantly hamper enforcement of Section 1 and its state law analogs.

The summary judgment stage of an antitrust trial is already a critical hurdle for substantial numbers of plaintiffs, particularly in federal court.[9] Expanding this standard unduly to foreclose the progress of difficult yet meritorious cases simply because such cases are based on circumstantial evidence will chill the public and private

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[9] *See* Thomas Greene et al., *State Antitrust Law and Enforcement*, PRACTISING LAW INSTITUTE, 1117 PLI/Corp. 957, 980 (May-June 1999) (noting that "[t]he importance of summary judgment in federal antitrust litigation cannot be minimized"); *and* Editors, *Judges Versus Juries in Antitrust: Rush to Summary Judgment*, 20 Antitrust L. & Econ. Rev. 1988 No. 2, at 1, 3 (noting that a preliminary analysis indicated that between one-half to two-thirds of the 142 antitrust cases decided in 1987 were won by defendants at the summary judgment stage in federal court) (cited in *id.*).

enforcement of the antitrust laws. Summary judgment is an appropriate tool for culling out unsupported cases before they reach a factfinder. Yet, the summary judgment standard employed by the Eighth and Ninth Circuits for antitrust conspiracy cases raises the bar too high and is untenable, given the importance of circumstantial evidence in antitrust conspiracy cases.

Finally, the existence of a contract, combination or conspiracy is a threshold requirement for price-fixing and other violations of Section 1 and its state law analogs. Obviously then, a legal standard that integrally affects the ability of law enforcers and plaintiffs to establish the existence of a conspiracy is of fundamental importance.

Resolution of the current circuit conflicts strongly warrants grant of certiorari in this case. Specifically, the range of circumstantial evidence, the detailed analysis by the *en banc* court below, including the dissent, provides this Court with an opportunity to write dispositively on the treatment of various forms of classic circumstantial evidence of conspiracy and how the concomitant inferences should be drawn and weighed.

III. THE DECISION OF THE EIGHTH CIRCUIT CONFLICTS WITH SUPREME COURT PRECEDENT.

Matsushita imposed a heightened evidentiary standard when dealing with economically implausible allegations. Although the Eighth Circuit professed to follow *Matsushita*, it failed to address the economic plausibility of the plaintiff's allegations before, as the Eighth Circuit put it, applying *Matsushita* "broadly" and summarily dismissing plaintiffs' claims. Pet. App. A-7.

This Court reiterated the importance of ascertaining the economic plausibility of an alleged antitrust claim in evaluating the supporting evidence in the case of *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451 (1992). In response to Kodak's contention that it was entitled to a legal presumption of lack of market power under the reasoning in *Matsushita*, this Court stated:

> Plaintiffs in *Matsushita* attempted to prove the antitrust conspiracy 'through evidence of rebates and other price-cutting activities.' . . . Because cutting prices to increase business is 'the very essence of competition,' the Court was concerned that mistaken inferences would be 'especially costly' and would 'chill the very conduct the antitrust laws are designed to protect.' . . . But the facts in this case are just the opposite. The alleged conduct – higher service prices and market foreclosure – is facially anticompetitive and exactly the harm that antitrust laws aim to prevent. In this situation, *Matsushita* does not create any presumption in favor of summary judgment for the defendant.

Kodak, 504 U.S. at 478 (citations omitted).

The horizontal price-fixing claims alleged by Petitioners in the case below are also "facially anticompetitive" and "exactly the harm that antitrust laws aim to prevent." *Id.* Yet, the Eighth Circuit neither addressed the differences in the factual allegations present in the case below and those in *Matsushita*, nor recognized the lessening of the evidentiary standards applicable to the evidence in the case below. Although such reasoning may result from the Eighth Circuit's concern over deterring procompetitive behavior, in actuality it may serve to raise

the evidentiary bar high enough to allow antitrust violators to slide summarily under it. This Court obviously did not intend the reasoning in *Matsushita* to be taken to such lengths.

In *Kodak*, the Court observed, "when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, the balance tips against summary judgment." *Id.* at 479. By failing to take into account the economic plausibility of the claims alleged in the case below, the Eighth Circuit unfairly tipped the scale back.

Finally, the Eighth Circuit's piecemeal method of analysis also conflicts with this Court's prior precedent. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), an antitrust case involving alleged violations of Section 1 of the Sherman Act, this Court stressed the necessity for evaluating the plaintiff's evidence of conspiracy as a whole, stating:

> In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

Id. at 699 (internal quotation marks and citation omitted).

Indeed, viewing the evidence as a whole is particularly important in cases involving allegations of conspiracy.

> Seemingly innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background against which the behavior takes place. Evidence can take on added meaning when viewed in context with all the circumstances surrounding a dispute.

Apex Oil Co. v. DiMauro, 822 F.2d 246, 255 (2d Cir. 1987).

In the case below, although the Eighth Circuit professed to consider the proof as a whole, it actually evaluated each portion of the evidence individually and determined that each piece standing alone did not "exclude the possibility of independent action by the producers" or did not "rebut the producers' independent business justification for their actions." Pet. App. A-9 – A-16. This piecemeal approach is contrary to this Court's clear precedent.

For these reasons, the Amici States urge the Court to grant certiorari. This Court should clarify that the appropriate analysis is exemplified by the Third Circuit's approach in *Petruzzi's*, 998 F.2d at 1231-33, in which the range of acceptable inferences varies according to the plausibility of a plaintiff's theory and the dangers to procompetitive conduct associated with such inferences. Thus, the less plausible the theory or the greater the dangers, the more unambiguous such evidence must be. This approach represents a synthesis of the *Matsushita* and *Kodak* decisions. Further, it reconciles the conflicting demands of FED. R. CIV. P. 56 standards and the policy interests of courts and defendants in rooting out implausible antitrust claims early in the judicial process. It also provides a reasonable standard which will allow law enforcers to effectively pursue civil law enforcement

actions against harmful price-fixing conspiracies under the Sherman Act and state antitrust laws.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari sought by Hahnaman Albrecht, Inc., et al. should be granted.

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In the Supreme Court of the United States

IN RE POTASH ANTITRUST LITIGATION

HAHNAMAN ALBRECHT, INC., ET AL.,
PETITIONERS,

v.

POTASH CORPORATION OF SASKATCHEWAN, INC., ET AL.
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Whether the evidence of conspiracy in this Sherman Act § 1 case, which both the district court and the court of appeals found to be speculative and "far too ambiguous" to be probative, "'tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (quoting *Monsanto Co.* v. *Spray-Rite Corp.*, 465 U.S. 752, 764 (1984)).

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RESPONDENT'S BRIEF IN OPPOSITION

The decision below rests on the routine application of settled legal principles. Applying the standards prescribed by the Court in *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Monsanto Co.* v. *Spray-Rite Corp.*, 465 U.S. 752 (1984), the en banc Eighth Circuit held that antitrust plaintiffs may not survive summary judgment if they fail to "present evidence that 'tends to exclude the possibility of independent action' by the defendants." Pet. App. A6 (quoting *Monsanto*, 465 U.S. at 768). After reviewing the evidence in this case under that standard, the court of appeals affirmed the district court's conclusion that the plaintiffs, the petitioners in this Court, "failed to present evidence of collusion sufficient to create a genuine issue of material fact." Pet. App. A19. The court of appeals therefore held that the defendants, respondents in this Court, were entitled to summary judgment.

Petitioners' challenge to the ruling below rests on a manifest mischaracterization of the court of appeals' holding. That court plainly did *not* hold, as petitioners would have it, that a "court, acting as a finder of fact, will weigh circumstantial evidence as it sees fit" (Pet. 5), or that antitrust plaintiffs are obligated to advance evidence constituting "the offer and acceptance of a particular price-fixing transaction." Pet. 7. To the contrary, the court of appeals expressly *disavowed* any such analysis. See Pet. App. A6. And, of course, petitioners advance the same red herring when they assert that the Eighth Circuit's holding conflicts with the decisions of other courts of appeals. In fact, there is no disagreement among the courts of appeals on the controlling standard; the Eighth Circuit either distinguished on factual grounds or *relied upon* the assertedly conflicting rulings.

Indeed, over the last two years this Court has denied certiorari in no fewer than five cases that presented precisely the same chimerical allegation of a conflict concerning the antitrust summary judgment standard. See *Gangi Bros.*

Packing Co. v. *Cargill, Inc.*, No. 99-1218, 120 S. Ct. 1531 (2000); *Super Sulky, Inc.* v. *United States Trotting Ass'n*, No. 99-67, 120 S. Ct. 172 (1999); *Harcros Chemical, Inc.* v. *City of Tuscaloosa*, No. 98-1997, 120 S. Ct. 309 (1999); *Amerisource Corp.* v. *HJB, Inc.*, No. 97-1148, 523 U.S. 1040 (1998); *Corner Pocket of Sioux Falls, Inc.* v. *Powerhouse Tech., Inc.*, No. 97-1097, 522 U.S. 1117 (1998). See also *Moyer Packing Co.* v. *Petruzzi's IGA Supermarkets Inc.*, No. 93-601, 510 U.S. 994 (1993). That disposition also would be appropriate here.

STATEMENT

1. Plaintiffs' argumentative statement of facts repeatedly asserts, in conclusory terms, that the defendants engaged in "joint action." Pet. 8, 9.[1] In fact, however, the developments that dictated potash price movements — which are essentially undisputed — have nothing to do with an agreement among the defendants.

It is uncontested that the North American potash industry is an oligopoly characterized by interdependence among firms. See Pet. App. A4. It also is undisputed that the industry has been the object of protectionist trade policies by the governments of both the United States and Saskatchewan. This combination of an oligopoly market structure and government intervention has produced dramatic ups and downs

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[1] Petitioners' characterization of the record is not supported by the documents they cite at Pet. 8-9; in every case, these documents suggest only an awareness of pricing interdependence. As explained by Professor Areeda, interdependence exists in an oligopoly market where "each firm is aware of its impact on the others. Though each may independently decide upon its own course of action, any rational decision must take into account the anticipated reaction of the other * * * firms [in the market]." VI P. Areeda & H. Hovenkamp, ANTITRUST LAW 175 (1995).

in potash prices over the past 25 years. The price roller coaster hit its low in the mid-1980s when respondent PCS — a corporation, then owned by the Province of Saskatchewan, that had by far the largest production capacity of any firm in the industry — greatly expanded its production. PCS pursued this strategy for political reasons, seeking to bolster employment in Saskatchewan and to pump money into the provincial economy. See *id.* at A5. The Saskatchewan government, however, miscalculated future potash demand, which fell during the early 1980s. As petitioners recognize (Pet. 8), the decline in demand at a time of dramatically increased production predictably led to a price war. By October 1986 the real price of potash had fallen to historically low levels. Pet. App. A5.

Following the provincial elections at the end of 1986, the Saskatchewan government prepared to privatize PCS. Pet. App. A5, A111-A112. To implement this shift in focus — from maintaining employment through high levels of production to achieving profitability by scaling production to demand — PCS replaced its upper-level management in the first quarter of 1987. The new executives were to carry out the Province's mandate to make the company profitable, the better to attract investors. *Ibid.*

At about the same time that PCS management changed, potash prices in the United States had fallen so far that two American potash producers petitioned the U.S. Department of Commerce ("DOC") to initiate an antidumping proceeding against the Canadian producers. Pet. App. A5. In August 1987 the DOC made a preliminary determination that Canadian imports were being sold at less than fair value; the DOC ordered the Canadian companies to pay cash deposits or post bonds on future exports to the United States in amounts equal to preliminary "dumping margins" set for each Canadian producer. *Id.* at A5, A112-A114. The DOC subsequently negotiated a compromise "Suspension Agreement" with each

of the Canadian producers that was designed to end the dumping inquiry by raising the price of Canadian potash sold in the United States. The Agreement was executed by the DOC and the Canadian producers on January 8, 1988. *Id.* at A8-A6, A115-A116. It provided a formula to use in determining the minimum price at which each Canadian producer could sell potash in the United States.

Saskatchewan, meanwhile, viewed the antidumping proceeding as an attack on its economy. The Province reacted to the DOC's preliminary dumping determination by enacting so-called "prorationing" legislation, which authorized both the imposition of mine-by-mine limits upon the rate of potash production and the allocation of the amount of production that would be permitted at each mine. The legislation, which was intended to discourage Canadian producers with low margins from undercutting the prices of higher-margin producers, was approved by the provincial legislature in September 1987. Pet. App. A114-A115.

These events necessarily caused potash prices to increase in 1987 and 1988. Following the DOC's announcement of the preliminary dumping margins in August 1987 and the introduction of Saskatchewan prorationing legislation in September 1987, PCS announced a $35 (U.S.) surcharge to its base list prices of approximately $60 per ton, adding that the surcharge would be refunded if the dumping action were resolved without the imposition of final dumping duties. Pet. App. A115.[2] Over the next several weeks the PCS price

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[2] While petitioners find it suspicious that this amount "was significantly lower than PCS' margin" (Pet. 9), the testimony concerning the origin of the $35 surcharge was uncontested: PCS chose the $35 figure because it covered the anticipated *industry average* dumping bond liability resulting from the preliminary margins. Plaintiffs' CA App. 983-985; Defendants' CA App. 406-407, 378. PCS expected that use of the industry average would

increase was followed first by nondefendant offshore producers (who did not face dumping liability) and then by other Canadian producers (who did face a dumping risk). *Ibid.*[3]

After entry of the Suspension Agreement in January 1988, PCS followed through on its promise to its customers to rebate the $35 surcharge. Pet. App. A117. Under pressure from their own customers, other Canadian producers — which had not promised rebates — also rebated some or all of the surcharge. See *ibid.* As a result of these rebates, real potash

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encourage other Canadian producers to impose, individually, a similar surcharge — a development that, in turn, would induce American farmers and consumers to pressure Congress and the DOC to terminate the antidumping proceeding. Pet. App. A143; Plaintiffs' CA App. 985; Defendants' CA App. 273, 283, 307-310, 378. Petitioners also purport to find some inconsistency between the imposition of the $35 surcharge in September and concerns expressed by PCS's president some four months earlier, in May 1987, that PCS might be injured by the imposition of a high dumping margin. Pet. 10. In fact, however, concerns about a high *individual* margin for PCS motivated — and are wholly consistent with — PCS's use of the *industry average* in computing its surcharge. Moreover, as the district court noted, PCS could simply have rescinded the surcharge had the price increase not been followed by its competitors, as it and other producers had rescinded past price increases. See Pet. App. A112; VI P. Areeda & H. Hovenkamp, *supra*, at 150.

[3] Petitioners assert that after imposition of PCS's surcharge "all Saskatchewan producers promptly added a $35 surcharge." Pet. 9. In fact, action by other producers was neither prompt nor uniform. See Defendants' CA App. 1-6, 8, 12-14, 110, 118-119, 131-132, 148-149, 231-233, 264-265, 268-269. Indeed, one non-Canadian defendant *undercut* the Canadian prices (it raised its prices by only $13.50 per ton for the balance of 1987). Defendants CA App. 141-142.

prices fell well below their September 1987 post-surcharge levels. *Id.* at A6. Thereafter, real U.S. potash prices continued to move downward during the alleged conspiracy period. *Ibid.*

2. Petitioners challenged respondents' pricing policies under Section 1 of the Sherman Act and, after extensive discovery, respondents moved for summary judgment. The district court granted the motions, adopting the magistrate judge's comprehensive, 144-page opinion. Pet. App. A104-A220. After a detailed review of the factual background (*id.* at A104-A119), the court explained that "'antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case,'" so that a jury may not "'infer the existence of a conspiracy from ambiguous evidence.'" *Id.* at A122, A123 (quoting *Matsushita,* 475 U.S. at 588, and *Lovett* v. *General Motors Corp.*, 998 F.2d 575 (8th Cir. 1993)). This standard assures that "lawful conduct is not, inadvertently, condemned and penalized." *Id.* at A125.

In reviewing an antitrust plaintiff's evidence, the court continued, "the existence of mere parallel pricing[] in an oligopoly, is not, standing alone, actionable." Pet. App. A127. Instead, "it is now settled antitrust law that only when the plaintiff shows the existence of * * * additional evidence — often referred to as 'plus factors' — does the evidence tend to exclude the possibility that the defendants were actually acting independently." *Id.* at A128. In reviewing that evidence, the district judge added, "the Court should not compartmentalize the evidence that is proffered by an antitrust plaintiff but, rather, should analyze the plaintiff's showings as a whole so as to determine if, in its integrated entirety, the evidence supports an inference of concerted action." *Id.* at A124. The court also noted that "'[o]n summary judgment[,] the inferences to be drawn from the underlying facts * * * must be viewed in the light most favorable to the party opposing the motion.'" *Id.* at A122 (citation omitted). But "where an

examination of the proffered 'plus factors' leads to an equally plausible inference that merely interdependent behavior is at hand, then there is no triable issue that would preclude a grant of Summary Judgment." *Id.* at A129. In applying this standard, the court engaged in an "exhaustive * * * appraisal of the evidentiary showings that the Plaintiffs regard as demonstrating the existence of triable issues of price fixing" (*id.* at A130-A131) —although in doing so the court "accept[ed], without reservation, [its] incapacity to adjudge, under the rubric of Rule 56, the credibility of the evidence." *Id.* at A131.

Turning to the record, the court noted that, "[g]iven the sheer volume" of materials presented by plaintiffs, "there is an instinctive natural inclination to presume that such a daunting collection of documents must, *a fortiori*, generate triable issues of fact." Pet. App. A132-A133. The court's consideration of the evidence, however, "convincingly persuaded [it] otherwise." *Id.* at A133. "After a most painstaking review," the court found that petitioners' evidence "is, quite literally, 'nonplus.'" *Id.* at A132. In reaching this conclusion, the court "examine[d] the Plaintiffs' evidentiary showings, as they have grouped them, in three categories of generalized proof * * * — namely, opportunity and motive; behavior that is contrary to economic self-interest; and interfirm communications." *Id.* at A134. While the court "follow[ed] the Plaintiffs' lead in compartmentaliz[ing] its discussion of the evidence, it * * * carefully reviewed this evidence as a blended whole, * * * so as to ascertain whether an 'inference of conspiracy is reasonable in light of the competing inference of independent action.'" *Id.* at A134-A135 (quoting *Matsushita*, 475 U.S. at 588). Because the court determined that an inference of conspiracy "would consist of unreasoned speculation," it concluded that the motions for summary judgment should be granted. *Id.* at A135.

3. The en banc Eighth Circuit affirmed the grant of summary judgment. Pet. App. A3-A46. Stating the governing standard articulated in this Court's decisions, the court explained that, to survive summary judgment, plaintiffs proceeding under § 1 of the Sherman Act

> must present evidence that "tends to exclude the possibility of independent action" by the defendants. *Monsanto*, 465 U.S. at 768. This means that conduct that is "as consistent with permissible [activity] as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588. * * * Applied in this case, the standard requires that if it is as reasonable to infer from the evidence a price-fixing conspiracy as it is to infer permissible activity, then the plaintiff's claim, without more, fails on summary judgment.

Id. at A6-A7. As a consequence, the court concluded, "[a] plaintiff has the burden to present evidence of consciously parallel * * * pricing *supplemented with* one or more plus factors." *Id.* at A8 (emphasis in original).

Applying this standard to the record, the court held that petitioners had not made out their case. The court recognized that "a high level of communications among competitors can constitute a plus factor which, when combined with parallel behavior, supports an inference of conspiracy." Pet. App. A8. But the court found that the evidence of interfirm communications (so-called "price verification" contacts) "presented by the class [petitioners] here is far too ambiguous to support such an inference." *Ibid.* The court noted that "[t]here is no evidence to support the inference that the verifications had an impact on price increases" (*id.* at A10); that there were only a few dozen contacts taking place over "at least a seven-year period in which there would have been tens of thousands of transactions" (*id.* at A11); and that "the

communications here are facially innocent contacts which are, at most, ambiguous." *Id.* at A13. The court likewise acknowledged that "[e]vidence that defendants have acted against their economic interest can also constitute a plus factor" (*id.* at A16), but it found "nothing in this record" that can "be construed as an act against self-interest." *Id.* at A17. And the court declined to decide whether expert econometric "evidence, in a proper case, could constitute a plus factor, because we find the report [of petitioners' expert] in this case is not probative of collusion." *Id.* at A18.

Judge John R. Gibson, joined by four other judges, dissented. Pet. App. A19-A46. Like the majority, the dissent invoked the "tends to exclude" standard and endorsed a "'plus factors' test * * * as a way to distinguish between innocent interdependence and illegal conspiracy." *Id.* at A29. Examining the record here, however, Judge Gibson reasoned that "the additional evidence tends to exclude the possibility that the producers acted independently." *Id.* at A33. Pointing to interfirm communications, and rejecting the majority's characterization of particular pieces of evidence as ambiguous, the dissent accordingly concluded that "this list of 'plus factors' adds up to evidence that satisfies the *Monsanto* standard." *Id.* at A45.

REASONS FOR DENYING THE PETITION

According to petitioners, this Court's decisions in *Matsushita* and *Monsanto* have been a font of confusion and uncertainty. In petitioners' telling, the Eighth Circuit read *Matsushita* to make it virtually impossible for any antitrust plaintiff to survive summary judgment, thus contributing to a burgeoning conflict in the circuits concerning the meaning of the *Matsushita* standard. This overcaffeinated rhetoric, however, has no basis at all in reality. In fact, *Matsushita* and *Monsanto* articulated clear and sensible rules that have been *uniformly* applied by *all* the courts of appeals — including the

Eighth Circuit. Petitioners' real complaint concerns not the summary judgment standard, but the fact that both courts below found the record evidence to be far too ambiguous to be probative of the alleged antitrust conspiracy. Petitioners' fact-bound challenge to that determination is insubstantial; it plainly does not warrant this Court's review.

A. The Eighth Circuit Faithfully Applied *Matsushita*'s "Tends to Exclude" Standard

1. "[T]he inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply [to a] trial on the merits." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In the antitrust area, that substantive law is described by *Matsushita* and *Monsanto*, which explain that the governing rule "limits the range of permissible inferences from ambiguous evidence in a [Sherman Act] § 1 case." This means that

> *conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.* * * * To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence *"that tends to exclude the possibility" that the alleged conspirators acted independently.*

Matsushita, 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764) (emphasis added). See Schwarzer, Hirsch & Barrans, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 495 (1991) (*Matsushita*'s "holding concerning impermissible inferences is based on substantive antitrust law"). As Professor Areeda accordingly described the settled understanding of *Matsushita* and *Monsanto*, "summary judgment should be granted for the defendant unless the evidence as a whole would allow a reasonable fact finder to conclude not just that the evidence is consistent with a

conspiracy but that the alleged conspiracy is more probable than not"; "when the evidence is in equipoise * * *, summary judgment will be granted [to the defendant]." II P. Areeda & H. Hovenkamp, ANTITRUST LAW 70 (1995). See *id.* at 71-72.

Petitioners are incorrect in the view that they expressed before the court of appeals, and that they rather vaguely repeat in the petition (see Pet. 20-21), to the effect that the Court retreated from this understanding of *Matsushita* and *Monsanto* in *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992). To be sure, the Court in *Kodak* stated that "*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." 504 U.S. at 468. That remark, however, referred not to *Matsushita*'s discussion of § 1 conspiracy law, but to its analysis of the application of ordinary summary judgment rules. *Matsushita* had applied the "settled principle[] that if the factual context renders [the plaintiffs'] claim implausible — if the claim is one that simply makes no economic sense — [the plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Matsushita*, 475 U.S. at 587. The defendant in *Kodak* had argued that it was entitled to the benefit of that rule because it had articulated an abstract economic theory supporting its position. See *Kodak*, 504 U.S. at 467. In rejecting that argument, the *Kodak* Court explained that *Matsushita* had not changed settled summary judgment law; it "did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment." *Id.* at 468 (emphasis in original). Thus, upon finding that the defendant's economic theory did *not* reflect the reality of the marketplace, the Court in *Kodak* was obligated to affirm the reversal of summary judgment in the defendant's favor.

In contrast, the Court in *Kodak* never addressed, let alone purported to disturb, the *substantive* rule of antitrust law in conspiracy cases that requires plaintiffs to present evidence that "tends to exclude the possibility" of independent action. That phrase does not appear in the Court's opinion in *Kodak*. And that is not surprising, because the issue of the existence of a § 1 conspiracy was not before the Court in *Kodak*; the case involved allegations of illegal tying and monopolization. See 504 U.S. at 462.

Petitioners' current position on the meaning of *Matsushita* actually is somewhat obscure. Compare, *e.g.*, Pet. 15-16 (the plaintiff survives summary judgment if evidence "advances its case on some nonfanciful interpretation of the facts") with *id.* at 17 ("ambiguous" evidence may not defeat summary judgment). Petitioners' principal contention in the court of appeals was that the *Matsushita* "tends to exclude" standard applies only when the alleged antitrust conspiracy makes no economic sense. See Appellants' C.A. Br. 14-20. But that argument plainly was wrong; the Court in *Matsushita* took pains to *reject* the proposition that, "if [the defendants] had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. * * * [C]onduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." 475 U.S. at 597 n.21. Petitioners therefore have abandoned the position they took in the court of appeals and now recognize that the "tends to exclude" standard applies in *all* § 1 cases. See, *e.g.*, Pet. 5, 17.

2. Given this vacillation in petitioners' position, their argument before this Court now appears to be that the Eighth Circuit somehow misunderstood the *Matsushita* "tends to exclude" standard. To establish this proposition, petitioners offer a lengthy and increasingly outlandish series of characterizations of the opinion below: they assert that it required antitrust plaintiffs to "directly establish the offer and

acceptance of a price-fixing agreement" (Pet. i); that it ruled that "inferences from disputed evidence will no longer be viewed in favor of the non-moving party" (*id.* at 5); that it permitted a court to "weigh circumstantial evidence as it sees fit" (*ibid.*); that it found petitioners' evidence insufficient because it "did not constitute offer and acceptance of a particular price-fixing agreement" (*id.* at 7); that it required antitrust plaintiffs "to exclude *all* possibility of independent action" (*id.* at 14 (emphasis added)); that it required plaintiffs to "prove their claims to the court, acting as a finder of fact" (*id.* at 22); and that it "makes it virtually impossible to maintain private actions against price-fixers without direct, smoking gun evidence." *Id.* at 27. In offering these improbable and hyperbolic assertions, petitioners expand on an argument advanced by the dissent below, which read the majority's opinion to "reject[] circumstantial evidence of conspiracy and require[] direct evidence." Pet. App. A20.

Notably, however, petitioners (and, for that matter, the en banc dissent) nowhere *quote* the Eighth Circuit as saying any of these unlikely things. And the reason for that omission is plain: those statements are a complete mischaracterization of the standard actually applied by the court of appeals. In fact, the Eighth Circuit expressly disclaimed that it was making "legal history" by insisting on direct proof of conspiracy, or by denying the relevance of circumstantial evidence. Pet. App. A6. Instead, the court of appeals took its standard verbatim from this Court's opinions, holding that antitrust plaintiffs must "present evidence that 'tends to exclude the possibility of independent action' by the defendants" (*ibid.* (quoting *Monsanto*, 465 U.S. at 768)); that "conduct that is 'as consistent with permissible [activity] as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy'" (*id.* at A6-A7 (quoting *Matsushita*, 475 U.S. at 588)); that "if it is as reasonable to infer from the evidence a price-fixing conspiracy as it is to infer permissible activity,

then the plaintiff's claim, without more, fails on summary judgment" (*id.* at A7); that "a plaintiff has the burden to present evidence of consciously paralleled pricing *supplemented with* one or more plus factors" (*id.* at A8 (emphasis in original)); and that summary judgment is appropriate when the nonmoving party "fail[s] to present evidence of collusion sufficient to create a genuine issue of material fact." *Id.* at A19.

The Eighth Circuit's approach thus did not, as petitioners would have it, require "direct" proof of conspiracy, or obligate antitrust plaintiffs to exclude *all* possibility of independent action. Quite the contrary: the court of appeals simply asked whether petitioners' evidence was more consistent with illegal conspiracy than with independent action. If it was not — that is, if the evidence was no better than in "equipoise" (II P. Areeda & H. Hovenkamp, *supra*, at 70) — it could not tend to exclude the possibility of independent action and summary judgment would be appropriate. This standard is entirely faithful to *Matsushita* and *Monsanto*. Petitioners accordingly direct their argument at a straw man when they contend that review is necessary because the Eighth Circuit's holding disregarded this Court's decisions.

B. The Courts Of Appeals Are Not In Conflict On The Meaning Of *Matsushita* and *Monsanto*

Petitioners demonstrate a similarly overactive imagination when they assert that the circuits are in conflict on the proper reading of *Matsushita* and *Monsanto*. See Pet. 5-6, 7-8, 17-21, 25-27. In fact, *every* circuit has quoted and faithfully applied an identical "tends to exclude" rule in § 1 conspiracy cases. See, *e.g.*, *Computer Identics Corp.* v. *Southern Pacific Co.*, 756 F.2d 200, 203 (1st Cir. 1985); *Clorox Co.* v. *Sterling Winthrop, Inc.*, 117 F.3d 50, 55 (2d Cir. 1997); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999); *Service & Training, Inc.* v. *Data General Corp.*, 963 F.2d

680, 685 (4th Cir. 1992); *Stewart Glass & Mirror, Inc.* v. *U.S. Auto Glass Discount Centers, Inc.*, 200 F.3d 307 (5th Cir. 2000); *American Council of Certified Podiatric Physicians & Surgeons* v. *American Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 619 (6th Cir. 1999); *Reserve Supply Corp.* v. *Owens-Corning Fiberglass Corp.*, 971 F.2d 37, 49 (7th Cir. 1992); *Corner Pocket of Sioux Falls, Inc.* v. *Video Lottery Tech., Inc.*, 123 F.3d 1107, 1112 (8th Cir. 1997); *In re Citric Acid Litig.*, 191 F.3d 1090, 1094, 1096-1097 (9th Cir. 1999), cert. denied, 120 S. Ct. 1531 (2000); *Mitchael* v. *Instacorp, Inc.*, 179 F.3d 847, 858 (10th Cir. 1999); *City of Tuscaloosa* v. *Harcros Chem., Inc.*, 158 F.3d 548, 570 (11th Cir. 1999); *Ostrzenski* v. *Columbia Hosp. for Women Found., Inc.*, 158 F.3d 1289, 1290 (D.C. Cir. 1998). The leading commentators also are in agreement. See II P. Areeda & H. Hovenkamp, *supra*, at 70-72.

In nevertheless arguing that the courts of appeals take differing approaches, petitioners contend that the Eighth Circuit "by its own admission[] issued a determination that conflicts with the rulings of other circuits." Pet. 5. In making this assertion, petitioners evidently have in mind the court of appeals' statement that "[w]e are among the majority of circuits to apply *Monsanto* and *Matsushita* broadly." Pet. App. A7 (citing *Corner Pocket of Sioux Falls* v. *Video Lottery Tech.*, *supra*). The court's statement, however, simply referred to its 1997 observation in *Corner Pocket* to the effect that, although earlier decisions of the Third and Ninth Circuits had been interpreted to hold that *Matsushita* applies only when the plaintiff's economic theory is implausible, most circuits "read *Matsushita* more broadly" to apply in *all* § 1 cases. *Corner Pocket*, 123 F.3d at 1109. Since then, the Third and Ninth Circuits have expressly acknowledged that *Matsushita*'s "tends to exclude" rule applies whether or not the defendants

had a plausible reason to conspire.[4] Indeed, as we note above, petitioners themselves appear to agree with this understanding of *Matsushita*. See page 12, *supra*. As a consequence, the "broad[]" approach to *Matsushita* discussed by petitioners actually is the approach uniformly taken by the courts of appeals.

That certainly is true of the Third, Seventh, and Eleventh Circuits, the courts that petitioners claim to have adopted a conflicting standard. See Pet. 7-8, 17-20, 25-27. Although petitioners are, again, exceedingly vague on the precise nature of the purported conflict, they appear to assert that these circuits will not grant summary judgment so long as the

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[4] Dicta in earlier decisions of those circuits could be taken to suggest that the "tends to exclude" approach applies only when the plaintiffs' theory is implausible as a matter of economics, as was true of the predatory pricing theory advanced in *Matsushita* itself. See *Petruzzi's IGA Supermarkets, Inc.* v. *Darling-Delaware Co.*, 998 F.2d 1224, 1232 (3d Cir. 1993); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 906 F.2d 432 (9th Cir. 1990). See also II P. Areeda & H. Hovenkamp, *supra*, at 70 (describing *Petroleum Products* dicta as "[q]uite wrong"); Schwarzer, Hirsch & Barrans, *supra*, 139 F.R.D. at 492 n.283 (noting that *Petroleum Products* statement was dicta because that "was not a case * * * in which plaintiffs' entire case depended on an inference from a set of facts at least equally consistent with lawful conduct"). But more recent decisions of those courts have disavowed that cramped view of *Matsushita*. See *Rossi* v. *Standard Roofing, Inc.*, 156 F.3d 452, 466 (3d Cir. 1998) ("even with a plausible motive to conspire, ambiguous conduct will not create a triable issue of fact with respect to the existence of a conspiracy"); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 123-124 (3d Cir. 1999) (applying "tends to exclude" standard to allegations of horizontal price-fixing); *In re Citric Acid Litig.*, 191 F.3d 1090, 1094-1095, 1096 (9th Cir. 1999) (dismissing *Petroleum Products* language as dicta and applying "tends to exclude" standard to allegations of horizontal price-fixing).

plaintiffs' evidence is *consistent* with conspiracy, even if the evidence is ambiguous or in equipoise and therefore does not *tend to exclude* the possibility of independent action. See, *e.g.* Pet. 18 (these courts purportedly will leave case to the jury when there is "reasonable evidence probative of conspiracy"). On examination, however, it is apparent that petitioners simply have seized on unexceptional cases in which the courts found summary judgment inappropriate because, on records very different from the one in this case, the evidence in fact *did* tend to exclude the possibility of independent action. Certainly, the snippets from those decisions that are quoted by petitioners stand only for a handful of innocuous propositions — evidence must be construed in the light most favorable to the nonmoving party, antitrust plaintiffs need not provide direct evidence of conspiracy, plaintiffs are not obligated to prove their cases "to a 100-percent certainty," and so on (Pet. 18, 19-20, 26) — that were fully embraced by the court below. By the same token, the ultimate standard applied by those courts is identical to the one used by the Eighth Circuit.

The Third Circuit. Petitioners purport to find support for their claim of conflict in *Petruzzi's IGA Supermarket, Inc.* v. *Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993). See Pet. 7, 19-20. In fact, however, the Third Circuit there held that simply establishing "a plausible conspiracy" does not permit a plaintiff to escape summary judgment unless the plaintiff also shows through unambiguous evidence that each defendant acted pursuant to an agreement. 998 F.2d at 1232-1233 ("the focus must remain on the evidence proffered by the plaintiff and whether that evidence 'tends to exclude the possibility that [the defendants] were acting independently'"). Although the Third Circuit found such proof as to two defendants where the record reflected *direct* evidence of conspiracy (including tape recordings of conspiratorial conversations) (see *id.* at 1233-1236), the court affirmed the grant of summary judgment as to a third defendant because

"we agree that the evidence put forward does not tend to exclude the possibility that [the defendant] acted independently." *Id.* at 1228.

Any doubt about the standard prevailing in the Third Circuit was dispelled by that court's more recent decision in *In re Baby Food Antitrust Litig.*, 166 F.3d 112 (3d Cir. 1999), a case that was relied upon by the court below (see Pet. App. A7-A8, A10, A11-A12) but is unaccountably ignored by petitioners. In that case — which, like this one, turned largely on allegations of improper pricing discussions between competitors — the Third Circuit *affirmed* the grant of summary judgment, emphasizing that

> [t]he extent of what constitutes a reasonable inference in the context of an antitrust case * * * is somewhat different from cases in other branches of the law in that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita*, 475 U.S. at 588. * * * Therefore, the Supreme Court has held in the antitrust context "that conduct [as] consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588 (citing *Monsanto*, 465 U.S. 752 at 764).

166 F.3d at 124. The court accordingly concluded that "care must be exercised to ensure that inferences drawn of unlawful behavior from ambiguous evidence do not infringe upon the defendants' freedom. * * * Thus, the court must ascertain whether the plaintiffs have presented 'evidence that is sufficiently unambiguous' showing that the defendants conspired." *Ibid.* (quoting *Matsushita*, 475 U.S. at 597).

That is precisely the standard applied by the Eighth Circuit in this case.[5]

The Seventh Circuit. Petitioners similarly miss the mark in asserting that the Seventh Circuit has adopted a differing standard. In fact, that court has long recognized that "there must be evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Reserve Supply Corp.* v. *Owens-Corning Fiberglass Corp.*, 971 F.2d 37, 49 (7th Cir. 1992) (internal quotation marks omitted). The decisions cited by petitioners are not to the contrary. Petitioners thus emphasize that in *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997), the court recognized that a defendant may not obtain summary judgment simply by asserting that inculpatory evidence "is susceptible of an innocent interpretation." *Id.* at 614. But the court nowhere reached the opposite extreme by suggesting that the plaintiff may *defeat* summary judgment with evidence that is no more probative of conspiracy than it is of innocent conduct. To the contrary, in holding that summary judgment was not properly granted in *Brand Name Drugs*, the court characterized the plaintiffs' evidence as "tasty morsels" and "'smoking guns.'" *Ibid.* The Eighth Circuit

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[5] Petitioners also find no support in *Rossi* v. *Standard Roofing, Inc.*, 156 F.3d 452 (3d Cir. 1998), which they cite at Pet. 21 n.6. There, the Third Circuit expressly embraced the *Matsushita* "tends to exclude" standard (see 156 F.3d at 465-466) and emphasized that, "even with a plausible motive to conspire, ambiguous conduct will not create a triable issue of fact with respect to the existence of a conspiracy." *Id.* at 466. Indeed, although the court held summary judgment inappropriate as to some defendants in *Rossi* because the evidence relating to them was unambiguous, it affirmed the award of summary judgment as to others because the plaintiff "failed to overcome his burden of showing that either [defendant's] actions tended to exclude the possibility of independent action on their part." *Id.* at 457.

distinguished *Brand Name Drugs* precisely because such "smoking gun" evidence is absent in this case. See Pet. App. A12-A13.[6]

The Eleventh Circuit. Finally, petitioners are wrong in relying on *City of Tuscaloosa* v. *Harcros Chem., Inc.*, 158

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[6] The other Seventh Circuit decisions cited by petitioners likewise do not support their assertion of a conflict. In *JTC Petroleum Co.* v. *Piasa Motor Fuels, Inc.*, 190 F.3d 775 (7th Cir. 1999) (cited at Pet. 18, 21 n.7, 26-27), the court nowhere indicated that summary judgment must be denied whenever the evidence is equally consistent with conspiracy and with independent action; instead, the court found summary judgment inappropriate because the plaintiff had powerful proof of conspiracy, including "evidence of cartelization," "suspicious producer price behavior," and "the pretextual character of the reasons the [defendants] gave for the refusal to deal." 190 F.3d at 779. There is no equivalent evidence in this case. Indeed, the court in *JTC Petroleum* declined to address the plaintiff's direct evidence of conspiracy because "[i]t strikes us as equivocal" (*ibid.*) — something that is (at worst) also true of the petitioners' evidence here. As for *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781 (7th Cir. 1999) ("*Brands II*"), in the portion of the opinion discussed by petitioners (at Pet. 25-26) the Seventh Circuit, discussing entitlement to a directed verdict, indicated that an antitrust plaintiff may prove its case by showing that the defendants' "behavior could *better* be explained on the hypothesis of collusion than on the hypothesis that each was embarked on an individual rather than a concerted course of action." 186 F.3d at 785 (emphasis added). See *id.* at 787 ("as the plaintiffs bore the burden of persuasion, it was necessary for them to present economic evidence that would show that the hypothesis of collusive action was *more* plausible than that of individual action") (emphasis added). That is, of course, the exact standard applied by the Eighth Circuit in this case. The court in *Brands II* also indicated that plaintiffs do not have to prove their case "to a 100-percent certainty" (*ibid.*); needless to say, the Eighth Circuit did not impose any such burden on petitioners here.

F.3d 548 (11th Cir. 1999). The Eleventh Circuit there expressly invoked the *Matsushita* "tends to exclude" standard (see *id.* at 569-570), explaining that defendants are entitled to summary judgment when "the plaintiffs' circumstantial documentary evidence is in equipoise." *Id.* at 569. See *ibid.* (summary judgment appropriate when evidence "as easily" supports innocent explanation as it does conspiracy). The court added that "the plaintiffs must show 'plus factors' that tend to exclude the possibility that the defendants merely were engaged in lawful conscious parallelism." *Id.* at 572. The court found that standard satisfied as to two defendants because, on the record before it, the odds that the defendants' market behavior could be innocently explained were "minuscule." *Ibid.* Here, in contrast, neither court below found anything remotely similar in the record.

C. The Court Of Appeals Correctly Concluded That The Evidence In This Case Does Not Tend To Exclude The Possibility Of Independent Action

Against this background, petitioners' argument ultimately reduces to the assertion that the court of appeals erred in its *application* of the *Matsushita* standard to the record in this case. Pet. 23-25. On the face of it, of course, that fact-bound contention does not warrant this Court's attention. But even viewed on its own terms, petitioners' argument — which simply disregards the factual analysis of both courts below — is insubstantial.

First, petitioners devote most of their attention to sporadic contacts in which defendants provided information to one another about the prices at which they had made particular past sales of potash, asserting that those contacts were pervasive and suspicious. Pet. 6-7, 23-24. But the courts below found that the record supported no such conclusion. Addressing petitioners' principal theory — that respondents conspired to raise prices in 1987 — the court of appeals explained that the

price contacts "bear[] *no* relationship to the price increases most in question" because "the price verification communications only concerned charges on particular completed sales, not future market prices. There is no evidence to support the inference that the verifications had an impact on price increases. The only evidence is that prices were possibly cut as a result." Pet. App. A9, A10 (emphasis added). The court added that, given the historically low levels of potash prices in 1987, the DOC dumping investigation, the privatization of PCS, and the enactment of prorationing legislation by Saskatchewan, "it would have been ridiculous for the remaining companies to not [follow the price leadership of PCS and] also raise their prices in a parallel fashion." *Id.* at A11. In these circumstances, the courts below surely were correct in concluding that "the evidence presented by the class here is far too ambiguous to support * * * an inference of conspiracy." *Id.* at A8.

The court found the same to be true of the suggestion that respondents conspired to stabilize and maintain prices. The court noted that "[t]he price verifications relied upon were sporadic and testimony suggests that price verifications were not always given"; that there were only a few dozen interfirm contacts "over at least a seven-year period in which there would have been tens of thousands of transactions"; and that there "is absolutely no * * * evidence" that "the exchanges of information had an impact on pricing decisions." Pet. App. A11, A12. In this setting, where the price communications were "facially innocent contacts which are, at most, ambiguous on the question whether the producers schemed to set prices" (*id.* at A13), the evidence does not tend to exclude the possibility of independent action.

In arguing to the contrary, petitioners assert that, under *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), competitors never have a legitimate reason to disclose their pricing data. Pet. 6-7, 23-24. This Court, however, has

forcefully stated the opposite: "[t]he exchange of price data and other information among competitors * * * can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive." *United States Gypsum Co.*, 438 U.S. at 441 n.16. That conclusion is supported by both precedent and scholarly commentary.[7] Indeed, the Court in *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U.S. 588 (1925), rejected a Sherman Act challenge to a systematic program of price exchanges that went far beyond anything alleged in this case. See *id.* at 603-606. Similarly, describing contacts that, again, go much further than the conduct alleged here, Professor Areeda explained that the "exchange [of] price information * * * does not imply a traditional conspiracy on price. * * * [T]he information or other contact does not itself imply any mutual assurances to use the information involved in any particular way." VI P. Areeda & H. Hovenkamp, *supra*, at 134. And that certainly is true in this case, where the district court found that the defendants' price contacts were attempts to verify assertions by customers that they had purchased potash in past transactions at particular prices — the very business justification that this Court recognized as legitimate in *Cement Mfrs.* See 268 U.S. at 605-606.

Second, petitioners rely on a memorandum from Canpotex (the lawful Canadian potash export association), dated January 8, 1988, which stated that "new price lists are being issued on Monday Jan. 11." Pet. App. A13. Petitioners read this reference to price "lists" as proof that respondents "coordinated the upcoming price rise," and insist that the Eighth Circuit used a "flawed analytical construct" in reaching

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[7] Such discussions, far from being evidence of an illegal commitment on price, occur routinely in interdependent industries and may serve a number of efficiency-enhancing purposes. See, *e.g.*, Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*, 67 GEORGETOWN L.J. 1187, 1191 (1979).

a contrary conclusion. Pet. 24; see *id.* at 10. As the court of appeals explained, however, the record does not reveal (and petitioners made no attempt to determine during discovery) "who received this 'smoking gun' piece of evidence." Pet. App. A15. And more fundamentally, petitioners' contention that the reference to "price lists" must evidence a conspiracy among all of the defendant potash producers is belied by the fact that on January 8, 1988, the day the Canpotex memorandum was written, PCS *publicly* announced its new prices for different grades of potash, stating in a telex to customers that the revised "[p]rice *lists* [would] be mailed Monday, January 11." Pet. App. A162 (emphasis added). This development confirms that the supposedly suspect memorandum referred to PCS's *unilateral* and announced decision to issue new price lists — a conclusion that is confirmed by the finding below that "the producers did *not* uniformly increase prices to match the memorandum on January 11, 1988, and furthermore, [that] one producer, Kalium, did not match the memorandum price at all." *Id.* at A15 (emphasis added). Again, then, the court of appeals was correct in holding that "the 'smoke' from this gun is barely, if at all, discernible." *Ibid.* See, *e.g.*, *Richards* v. *Neilsen Freight Lines*, 810 F.2d 898, 903-904 (9th Cir. 1987) (Kennedy, J.) (reference to industry practice as a "gentleman's agreement" not sufficient to defeat summary judgment because several "interpretations" of the reference were possible and "[i]f a jury verdict were based on the 'gentleman's agreement' testimony, it necessarily would be speculative").

D. Even If The Court Were Inclined To Revisit Otherwise Settled Principles Of Antitrust Conspiracy Law, This Case Presents An Inappropriate Vehicle With Which To Do So

Finally, in the event the Court were interested in revisiting *Matsushita* and *Monsanto* — and, given the uniformity in the circuits, there is no reason it should — this case would not

present a suitable vehicle for doing so. The lawsuit contains several unusual features that make it highly atypical in crucial respects. And it is plain that petitioners could not prevail under any plausible standard. Further review therefore is not warranted for these reasons as well.

First, this case is out of the ordinary because it is undisputed that the governments of the United States and Saskatchewan took steps to *force* a substantial price increase. The DOC antidumping proceeding obligated respondents to raise their prices. The privatization of PCS required that firm — the dominant producer in the market — to raise prices and cut production. The Saskatchewan prorationing legislation made it a practical impossibility for other firms to undercut PCS's price. And the oligopolistic structure of the commodity potash industry induced all firms (defendants and nondefendants alike) to "follow-the-leader" in their pricing decisions, with every producer necessarily pricing at approximately the same level. See *Clamp-All Corp.* v. *Cast Iron Soil Pipe Institute*, 851 F.2d 478, 484 (1st Cir. 1988) (Breyer, J.). This last point is proved by the decision of the other Canadian producers to follow PCS's lead in early 1988 and rebate the $35 surcharge imposed in September 1987; it hardly can be suggested that respondents conspired to give large *refunds*. In this setting, the price rise challenged by petitioners is completely explained by nonconspiratorial factors that are unlikely to be replicated in other cases.

Second, complex antitrust suits typically hinge on expert testimony concerning economics and market behavior. But petitioners' case is especially defective in that regard because both courts below found that their expert's testimony was essentially valueless. Indeed, the court of appeals discounted the opinion of petitioners' expert, both because his model "consider[ed] neither the privatization of PCS nor the anti-dumping proceedings" (Pet. App. A18) and because his report "relie[d] almost exclusively on evidence (such as the

producers' common membership in trade associations and their publication of price lists to customers) that is not probative of collusion as a matter of law." *Id.* at A18-A19. The court therefore dismissed the expert's opinion as "fundamentally unreliable." *Id.* at A19. As a consequence, petitioners' arsenal is lacking a key component that generally is critical to the success of antitrust plaintiffs. Indeed, we are unaware of *any* complex antitrust case that has gone to the jury without competent expert testimony.

Third, the close review of the record conducted by both courts below established that petitioners are relying on evidence that is, at best, "speculation" and "far too ambiguous" to be probative. Yet it is settled that antitrust plaintiffs may not defeat summary judgment by piling one atop another as many ambiguous and innocuous bits of evidence as they can find. As then-District Judge Becker explained the governing principle in rejecting a similar attempt by antitrust plaintiffs in *Matsushita*, "[n]othing plus nothing times nothing still equals nothing." *Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1311 (E.D. Pa. 1981), aff'd in part and rev'd in part, 723 F.2d 238 (3d Cir. 1983), rev'd, 475 U.S. 574 (1986). That elementary rule of arithmetic dictates the outcome of this case as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN RE POTASH ANTITRUST LITIGATION

HAHNAMAN ALBRECHT, INC., ET AL.,
PETITIONERS,

v.

POTASH CORPORATION OF SASKATCHEWAN, INC., ET AL.
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENTS' SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8 of the Rules of this Court. respondents submit this supplemental brief to address matters raised in the *amicus* brief filed by Alabama, *et al.* ("the States"), in support of the petition for certiorari in this case.

Comparing the petition with the brief submitted by the States reveals that petitioners and their *amici* make very different and substantially inconsistent arguments. The States submit that the "tends to exclude" rule of *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), applies only when the alleged conspiracy is economically implausible. Petitioners, by contrast, have abandoned that argument and instead appear to assert — insofar as their submission on the point is intelligible — that the "tends to exclude" rule applies in *all* cases, but that it requires only that the plaintiffs' evidence be *consistent* with conspiracy. That petitioners and their *amici* cannot agree on what is wrong with the court of appeals' decision confirms our point: there is nothing wrong with that decision at all.

1. The States' principal argument is that the circuits are in conflict on whether the *Matsushita* test applies only when the plaintiffs' conspiracy allegation is implausible as a matter of economics. States' Br. 4-8. But this contention cannot support the grant of certiorari because, as we note in the brief in opposition (at 12), it is not an argument that is advanced in the petition. And the States' claim is, in any event, patently wrong. As we also explain in the brief in opposition (at 15-16 & n.4), the courts of appeals have now *uniformly* rejected the view that the "tends to exclude" standard governs only implausible conspiracy allegations. Thus the Third Circuit, to whose views the States call special attention (at Br. 6, 7-8), has held unequivocally that, "*even with a plausible motive to conspire*, ambiguous conduct will not create a triable issue of fact with respect to the existence of a conspiracy." *Rossi* v. *Standard Roofing, Inc.*, 156 F.3d 452, 466 (3d Cir. 1998) (emphasis added). See also *In re Baby Food Antitrust Litig.*,

166 F.3d 112, 123-124 (3d Cir. 1999) (applying "tends to exclude" standard to allegations of horizontal price fixing). Similarly, the Sixth and Seventh Circuits, whose decisions also are cited by the States (at Br. 7), likewise have applied the *Matsushita* "tends to exclude" standard to perfectly "plausible" allegations of anticompetitive conduct. See, *e.g.*, *American Council of Certified Podiatric Physicians & Surgeons* v. *American Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 611-612, 619 (6th Cir. 1999) (applying "tends to exclude" rule to allegation that horizontal competitors conspired to "reduce plaintiff's presence as a competitor in the market");[1] *Reserve Supply Corp.* v. *Owens-Corning Fiberglass Corp.*, 971 F.2d 37, 49 (7th Cir. 1992) (applying "tends to exclude" rule to allegations of horizontal price fixing).

As we have explained, the Court has denied certiorari repeatedly when faced with petitions presenting precisely this allegation of a conflict. See Br. in Opp. 1-2. Indeed, the State of California, one of the state *amici* in this case, also filed as an *amicus* in support of the petition in *Gangi Bros. Packing Co.* v. *Cargill, Inc.*, No. 99-1218, making exactly the same allegation of a split in the circuits that it advances now. See

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[1] *Ezzo's Invs., Inc.* v. *Royal Beauty Supply, Inc.*, 94 F.3d 1032 (6th Cir. 1996), which is cited by the States (at Br. 7), is not to the contrary. There, the court pointed to *direct* evidence that the plaintiff "was asked to fix prices and that he was cut off for not doing so"; noted that *Matsushita* asks whether the plaintiff's evidence "tends to exclude" the possibility of independent action; and found that "[i]n this case, [the plaintiff's evidence] has done just that." 94 F.3d at 1035, 1036. Although the court also observed that the plaintiff's claim in *Ezzo's* was plausible, it did so in addressing *Matsushita*'s discussion of ordinary summary judgment rules, *not* its analysis of the substantive antitrust law that "limits the range of permissible inferences from ambiguous evidence in a [Sherman Act] § 1 case." *Matsushita*, 475 U.S. at 588. See Br. in Opp. 11-12.

No. 99-1218, Br. of State of California, at 3-8. The Court denied review. 120 S. Ct. 1531 (2000). Unlike a fine Camembert, California's arguments have not improved with age.

2. Entirely apart from the question whether the circuits are in conflict, the States are incorrect in asserting that *Matsushita* meant its rule to apply only to "economically implausible allegations." States' Br. 10; see *id.* at 3-4, 10-12. Again, this argument is wholly beside the point because it is not advanced in the petition. See Br. in Opp. 12. And the reason for that omission is plain: the States' contention is patently wrong. While the predatory pricing conspiracy alleged in *Matsushita* may in fact have been implausible as a matter of economics, the Court in that case expressly rejected the *very argument* advanced by the States here:

> [w]e do not imply that, if [the defendants] had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co.* v. *Spray-Rite Corp.*, 465 U.S. 752 (1984), establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy. *Id.* at 763-764.

Matsushita, 475 U.S. at 597 n.21. And as we explained in the brief in opposition (at 11-12), the Court's decision in *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992), did not change the *Matsushita* analysis at all.

3. The States are similarly incorrect in asserting that the courts below engaged in an improper, "piecemeal" method of analyzing the evidence. States' Br. 12-13. In fact, the district court expressly acknowledged that it "should not compartmentalize the evidence that is proffered by an antitrust plaintiff but, rather, should analyze the plaintiff's showings as a whole so as to determine if, in its integrated entirety, the

evidence supports an inference of concerted action." Pet. App. A124. The district court added that, although it "follow[ed] the Plaintiffs' lead in compartmentalizing [its] discussion of the evidence, [it] * * * carefully reviewed this evidence as a blended whole, * * * so as to ascertain whether an 'inference of conspiracy is reasonable in light of the competing inference of independent action.'" *Id.* at A134-A135 (citation omitted). The court of appeals affirmed that approach. Needless to say, that the courts below addressed petitioners' evidentiary submissions in the order in which petitioners presented them hardly means that those courts improperly "compartmentalized" the evidence. As the Second Circuit put it in identical circumstances:

> [a]lthough the logical presentation of our holding has required us to treat each of [the plaintiff's] claims of anticompetitive conduct separately, we have not ignored [the rule of *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), that the evidence not be compartmentalized.] We have found, however, that in numerous critical respects [the plaintiff's] proof was utterly lacking. Under such circumstances, treating [the plaintiff's] claims collectively cannot have any synergistic effect.

Northeastern Tel. Co. v. *American Tel. & Tel. Co.*, 651 F.2d 76, 95 n.28 (2d Cir. 1981).

4. Like petitioners, the States ratchet up the hyperbole in contending that the Eighth Circuit's decision "create[s] a virtually insurmountable barrier to the successful prosecution" of antitrust conspiracies by making it impossible for "an antitrust plaintiff [to] rely on circumstantial evidence of the alleged conspiracy." States' Br. 1, 9. Also like petitioners, however, the States fail to explain just where in its opinion the court of appeals issued this remarkable holding. The reason, of course, is that the court held no such thing. As we explain

in the brief in opposition, the Eighth Circuit explicitly acknowledged that antitrust plaintiffs *may* rely on circumstantial evidence, invoked the *Matsushita* "tends to exclude" standard, and held petitioners' case inadequate because their evidence was "far too ambiguous" to be probative of conspiracy. Br. in Opp. 13-14, 22. For its part, the district court likewise expressly noted that "'the inferences to be drawn from the underlying facts * * * must be viewed in the light most favorable to the party opposing the [summary judgment] motion,'" going on to reject petitioners' claims under this standard only because petitioners' case rested on "unreasoned speculation." Pet. App. A122, A135 (citation omitted). The States, like petitioners, are unable to show what is wrong with these fact-bound applications of established law.

5. Finally, the States — which did not participate below and plainly are unfamiliar with the record here — do not even attempt to explain why this case would be a suitable one in which to address the issues they present. In fact, as we note in the brief in opposition (at 24-26), this case is highly atypical because the governments of the United States and Saskatchewan intentionally *forced* a price increase; because the government of Saskatchewan made it virtually impossible for Canadian potash producers to undercut one another's prices; and because the courts below rejected the opinion of petitioners' expert as "fundamentally unreliable." Pet. App. A19. In these circumstances, petitioners — who bear the burden of proof — could not hope to establish their claim of price-fixing under any reasonable standard. If the States seek to change the rules of *Matsushita* and *Monsanto* to make it easier for insubstantial antitrust claims to survive summary judgment, they should wait for a case in which their arguments could affect the outcome. That is not true of the entirely speculative claims advanced by petitioners here.

CONCLUSION

For the foregoing reasons and those presented in the brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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